TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1955

No. 380

EDWIN B. COVEY, COMMITTEE OF THE PERSON AND PROPERTY OF NORA BRAINARD, AN INCOMPETENT, APPELLANT,

vs.

TOWN OF SOMERS

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

FILED SEPTEMBER 8, 1955.

JURISDICTION NOTED NOVEMBER 7, 1955.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1955

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INDEX

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., DEC. 13, 1955

5847-9

[fol. 1]

COURT OF APPEALS OF THE STATE OF NEW YORK

In the Matter of the Foreclosure of Tax Liens, pursuant to Article Seven A, Title Three, of the Tax Law, by the Town of Somers, Respondent-Respondent.

Edwin B. Covey, Committee of the person and property of Nora Brainard, an incompetent, Petitioner-Appellant

Statement Under the Rule

Petitioner, Edwin B. Covey, Committee of the person and property of Nora Brainard, an incompetent, appeals, pursuant to leave granted by an order of the Appellate Division, Second Department, made and entered in the office of the Clerk of said Court on June 1, 1954, certifying a question of law, from an order of the said Court made and entered on the 12th day of April, 1954, one Justice dissenting, affirming an order made and entered in the office of the County Clerk of Westchester County on the 16th day of December, 1953, denying his motion to open default and vacate the judgment of foreclosure, set aside deed and permit him to appear.

Petitioner appeared by King & Tumminelli, as his attorneys and now appears by Adolph I. King.

Respondent is represented by Stanley E. Anderson.

There has been no change of parties or attorneys since the commencement of the within proceeding, except as above set forth.

[fol. 2] In County Court of Westchester County

Notice of Appeal to Appellate Division—December 23, 1953

In the Matter of the Foreclosure of Tax Liens, pursuant to Article Seven A, Title Three, of the Tax Law, by the Town of Somers, List of Delinquent Taxes for 1952

Sir:

Please take notice that the petitioner-appellant, the Committee of Nora Brainard, an incompetent, appeals to the

Appellate Division of the Supreme Court of the State of New York, in and for the Second Judicial Department, from the final order herein, dated December 2nd, 1953, and entered in the Office of the County Clerk of Westchester County on December 16th, 1953, said order denying the application to open the default and vacate the judgment of foreclosure, and set aside the deed, and to permit the Committee of the said incompetent to appear in the above entitled in rem proceeding, and the petitioner-appellant appeals from each and every part of said Order.

Dated, New York, N. Y., December 23, 1953.

Yours, etc., King & Trumminelli, Attorneys for Petitioner-Appellant, Office & P. O. Address, 111 Broadway, Borough of Manhattan, City of New York.

To: Stanley E. Anderson, Esq., Attorney for Respondent Office & P. O. Address, 15 E. Main Street, Mt. Kisco, New York.

[fol. 3] In County Court of Westchester County

Order Appealed From—December 16, 1953

A motion having been made to open the default, vacate judgment of foreclosure and to set aside deed and to permit the defendant, Nora Brainard, to appear in the above entitled proceeding and said motion having duly come on to be heard, now

On reading and filing the order to show cause dated October 22, 1953 made by Hon. George M. Fanelli and the affidavit of Adolph I. King sworn to October 21, 1953 and the affidavit of Edwin B. Covey, sworn to October 21, 1953, and after hearing Adolph I. King of the firm of King & Tumminelli, attorneys for said defendant, in support of said motion, and Stanley E. Anderson, attorney for the Town of Somers, in opposition thereto, and after due deliberation and the Court having filed its memorandum;

Now, on motion of Stanley E. Anderson, attorney for the Town of Somers, it is

Ordered that the motion be and the same hereby is in all respects denied, and it is further

[fol. 4] Ordered that the stay provided for in the order to show cause dated October 22, 1953 staying a sale of the property in question be and the same hereby is vacated.

Enter,

John P. Donohoe, County Judge.

In County Court of Westchester County

Order to Show Cause—October 22, 1953

On reading and filing the annexed affidavits of Adolph I. King and Edwin B. Covey, both duly verified the 21st day of October, 1953 and upon all the pleadings and proceedings heretofore had herein, let the Town of Somers, County of Westchester, State of New York, by its Supervisor or other duly elected official of said Town having knowledge of the facts, show cause at a Special Term of County Court to be held in and for the County of Westchester, at the County Courthouse, White Plains, New York on the 26th day of October, 1953 at the opening of court on that day, or as soon thereafter as counsel can be heard, why an order should not be made herein opening the default of Nora Brainard, an incompetent, one of the persons referred to in the "Notice of Foreclosure of Tax Liens by the Town of Somers, in Rem" as the owner of a certain parcel of improved real property shown and designated on the Tax Map of the Town of Somers as [fol. 5] Sheet 19B Block 3016 Lots 1-4, inclusive, and the judgment heretofore entered herein against the said parcel of improved real property on the 8th day of September, 1952 should not be vacated and the deed dated on or about the 24th day of October, 1952 delivered to the Town of Somers and recorded in the office of the Clerk of the County of Westchester, Land Records Division in Liber 5149 of Deeds, Page 48, should not be set aside and permitting the said Nora Brainard, an incompetent, by Edwin B. Covey, her Committee to answer or appear or otherwise move with respect to the said "Notice of Foreclosure of Tax Liens by the Town of Somers, in Rem" and for such other and further relief as to this Court may seem just and proper, and it appearing to my satisfaction that said mo-

tion should be brought on in less time than would be required under an ordinary notice of motion, service of an order upon the Supervisor or Town Clerk of the Town of Somers, Westchester County, State of New York on or before the 23rd day of October, 1953, shall be deemed sufficient; and until further order of this Court all proceedings including the proposed sale of the real property referred to herein as Sheet 19B, Block 3016 Lots 1-14, inclusive as shown and designated on the Tax Map of the Town of Somers, on the part of the Town of Somers, its duly elected officials, under the judgment heretofore entered herein on the 8th day of September, 1952, are hereby stayed.

Dated: White Plains, New York, October 22nd, 1953.

George M. Fanelli, Judge of the County Court.

[fol. 6] IN COUNTY COURT OF WESTCHESTER COUNTY

AFFIDAVIT OF ADOLPH I. KING, READ IN SUPPORT OF MOTION —Verified October 21, 1953

STATE OF NEW YORK,
County of Westchester, ss.:

ADOLPH I. KING, being duly sworn, deposes and says:

That I am an attorney at law, duly licensed to practice in the State of New York and am a member of King and Tumminelli, attorneys for Edwin B. Covey, Committee of the person and property of Nora Brainard and likewise attorneys for Harry B. Brainard, husband and sole surviving heir at law of the said Nora Brainard, the said Harry B. Brainard, being a non-resident of the State of New York.

That I make this affidavit in support of the application to open the default of the said Nora Brainard and to vacate the judgment entered herein on the 8th day of September, 1952 and to set aside the deed to the Town of Somers dated on or about the 24th day of October, 1952 and for such other and further relief as to this court may seem just and proper.

This proceeding, referred to as an "In Rem Foreclosure" pursuant to Sections 165, et seq of the Tax Law of the State of New York was begun by publication of the Notice of Foreclosure in the Westchester Post and The Record, publications in the vicinity of the Town of Somers and by the posting and mailing of said notices to the persons referred to on the Tax Rolls as the last owner of said [fol. 7] property. It is presumed that notice was sent to the said Nora Brainard at her last known address.

That on September 8th, 1952, judgment of foreclosure was entered herein and on or about October 24th, 1952, a deed to the property owned by the incompetent and referred to as Sheet 19B Block 3016 Lots 1—4, inclusive on the Tax Map of the Town of Somers was delivered to the Town of Somers and duly recorded.

From investigation made by me and from conversations had with the duly-elected officials of the Town of Somers, I am of the opinion that the said Nora Brainard was and has been an incompetent for more than 15 years. I have been advised that more than 2 years ago efforts were made by one of the Justices of the Peace of the Town of Somers to have her committed to Grasslands Hospital, a State Hospital for Mental Defectives, by reason of her mental condition. I have been further advised that on many occasions the State Police were called to abate the nuisances committed by the said Nora Brainard. That she had no living relatives in this State.

On October 24th, 1952 or 3 days after the delivery of the deed referred to herein, the said Nora Brainard was adjudicated as a person of unsound mind and on November 6th, 1952 was admitted to Harlem Valley Hospital.

I have been advised and the official records reveal that the said Nora Brainard was a person of means, able to meet her obligations, being the owner of 4 parcels of improved real property other than the one referred to herein, and could have complied with the Notices had she been able to comprehend the meaning thereof.

"In Rem Foreclosures" have been declared constitutional. However, the precise question as to their consti- [fol. 8] tutionality, when instituted against a known incompetent has not been decided. This special proceeding

was adopted to assist a municipality in the collection of taxes with the least degree of expense. It was intended to afford the owner reasonable notice with a likelihood of actual notice to give to the owner a reasonable opportunity to protect his land. (*City of Utica* v. *Proite*, 178 Misc. 925). Because the proceeding is in derogation of common law, it must be strictly construed.

In the instant proceeding an application was made to have an attorney designated to investigate whether or not any person affected were engaged in the military service, to protect the interests of these persons, if any. This requirement is not set forth in the Tax Law but is set forth in Soldiers and Sailors Civil Relief Act and the Military Law of the State of New York. If these sections are referred to in these proceedings to protect the interest of those in the Armed Forces, why should not an effort be made to protect the interest of an incompetent and an application made under Section 226 of the Civil Practice Act? This incompetent, even had actual notice been given to her, could not comprehend the meaning thereof and protect her land and improvements.

I am of the opinion and verily believe that the judgment of foreclosure with respect to the property of this incompetent to be invalid and a nullity and that the statute in this respect, Sections 165 et seq is unconstitutional. True enough the statute refers to the interest of incompetents and infants in the real property, but it makes no mention as to the method of procedure. It should therefore be read in the light of other sections of the law as in the case of [fol. 9] those in the military service. Had a person been designated to accept service or in the case of an infant, a special guardian be appointed, in each case to protect the interest of the incompetent or infant, their interest could be barred and such action would then be constitutional, as notice, reasonable or actual, would have been communicated to the individual by his representative.

These sections did not intend the municipality to profit by the delinquency of the payment of taxes but was created to enforce collection. In the instant case the tax arrears, interest, penalties, foreclosure costs and cost of maintenance amounts to less than $500.00. The minimum price

referred to in the notice of sale is $3,500.00 or more than 7 times the delinquency. It is of interest to note that the first minimum price was fixed at $6,500.00 or more than 13 times the delinquency. To permit this sale in the light of facts would further continue an injustice against this person.

On September 15th, 1953, I appeared at the Town Board Meeting of the Town of Somers and offered to the Town officials all of the arrears as noted herein on behalf of the incompetent and her committee in consideration of a return of the said property but my offer was refused.

I, therefore, join in the prayer of Edwin B. Covey for the relief demanded in the order to show cause and in the affidavit of Edwin B. Covey for which no previous application has been made.

Adolph I. King.

(Sworn to October 21, 1953.)

[fol. 10]—In County Court of Westchester County.

Affidavit of Edwin B. Covey, Read in Support of Motion —Verified October 21, 1953

State of New York,
County of Westchester, ss.:

Edwin B. Covey, being duly sworn, deposes and says:

That I am an attorney of law, duly licensed to practice in the State of New York, and am the Committee of the person and property of Nora Brainard, an incompetent, having been appointed by order of this Court, on January 30th, 1953, by an order made and entered on that day by the Hon. Arthur D. Brennan, Judge of the County Court of the County of Westchester.

That on February 13, 1953, I caused to be filed with the County Clerk of the County of Westchester, a bond in the sum of $3,000.00, pursuant to the provisions of the order dated January 30th, 1953, appointing me Committee of the said incompetent as set forth herein.

That I make this affidavit in support of my application

as Committee of the person and property of Nora Brainard, an incompetent, to open the default occasioned by her in the within proceeding, vacating the judgment entered herein on the 8th day of September, 1952, and to set aside the deed delivered to the Town of Somers herein on October 24th, 1952, which deed was recorded in Liber 5149 of Deeds, page 48, in the Office of the Clerk of the County of Westchester, Division of Land Records.

Upon information and belief, the said Nora Brainard [fol. 11] was incompetent, although not adjudicated, for many years past and was known to the citizens of the Town of Somers, in which she resided, and to the officials of the Town, as a person without mental capacity to handle her affairs and unable to understand the meaning of any notices served personally upon her by mail or by publication. That the said Nora Brainard, on November 6th, 1952, was admitted to the Harlem Valley Hospital as a person of unsound mind, by an order of certification of the County Court, County of Westchester, dated October 29th, 1952. That on May 8th, 1952, this action was begun by publication of a Notice of Foreclosure of Tax Liens, by the Town of Somers, by action in rem, in the "Westchester Post" and "The Record", publications serving the area of the Town of Somers. That as appears more fully from the affidavit of Anna D. Fuchs, Receiver of Taxes of the Town of Somers, dated July 22nd, 1952, attached to the papers in the within proceeding, the said Anna D. Fuchs filed a verified list of delinquent taxes with the County Clerk of the County of Westchester, and designated the aforesaid papers for publication. That on April 30th, 1952, the said Anna D. Fuchs posted notice designated "Notice of Foreclosure of Tax Liens by the Town of Somers by Action in rem", and posted similar notices in the Post Offices of the Town of Somers, located at Somers, Lincolndale and Shenorock. On April 30th, 1952, the said Anna D. Fuchs mailed a notice, together with a statement addressed "To the party to whom the enclosed notice is addressed" to each person named in the list of delinquent taxes at the last known address, as appears from the said tax liens. [fol. 12] That upon information and belief, one of the persons to whom the said notice was mailed was the incompetent Nora Brainard.

That as appears more fully from the affidavit of Stanley E. Anderson, attorney for the Town of Somers in the within proceeding, dated July 23rd, 1952, a list was filed with the County Clerk on April 29th, 1952, and a certified copy of said list filed on the same date at his office at 15 East Main Street, Mt. Kisco, New York, and a certified copy likewise filed with Anna D. Fuchs, Receiver of Taxes of the Town of Somers. That said affidavit of Stanley E. Anderson refers to the posting of notices and publication and notice under Section 165 (b) of the Tax Law, and of the mailing of said notices.

That the said affidavit of Stanley E. Anderson then states:

> "That more than twenty days have expired since the date fixed as the last date for the redemption in said notice of foreclosure, and no party or owner has filed an answer to this action",

and further states:

> "The time of each and every person to appear or answer has now expired and all of the parties are now in default for want of pleading."

That by coincidence I, at that time not knowing the incompetent, Nora Brainard, nor having any knowledge regarding her, was appointed Special Guardian in the said action, by order dated July 24th, 1952, made and entered by the Hon. Arthur D. Brennan, Judge of the within Court, "to report and protect the interests of persons affected by [fol. 13] this action, having any right, title or interest in or lien upon any parcel involved herein, who are in the Military Service of the United States, pursuant to the Soldiers' and Sailors' Civil Relief Act and the Military Law of the State of New York, and any Act Amendatory thereto." That pursuant to said order I made an investigation regarding the persons named in the said tax delinquent list and determined that none of said persons were in the Military Service, and therefore consented to the entry of the judgment herein, solely upon that basis.

That subsequent thereto, I was retained by the Northern Westchester Bank, for the purpose of instituting an

action to foreclose a mortgage upon the said property owned by the incompetent, and upon investigating the same, learned of the mental capacity of the said Nora Brainard, and by reason thereof withheld proceeding with said action, knowing from my investigation that she was a person of unsound mind and unable to understand the nature of her acts or the nature of process to be served upon her. This information, which I then gained, was available to all persons in the Town of Somers, from mere investigation or conversation with the neighbors of the incompetent.

That in my report filed in the within action I noted that all of the property referred to in the said action, other than that owned by the said Nora Brainard was unimproved, although I did not know then that this was the home of the said Nora Brainard, an incompetent.

I am of the opinion and verily believe that although an in rem tax lien foreclosure is constitutional, I do not believe [fol. 14] that it was intended to be permitted where the party listed as one of the owners of the said property was known to have been incompetent and unable to understand the meaning of the notice to be published, posted and mailed to the persons named in the said tax delinquent list. I am mindful of the fact that the statute refers to the barring of any claim of an infant or incompetent, but verily believe that this provision, if intended to mean what it says, is unconstitutional, as depriving the person named of property without due process of law.

The Legislature, in granting Section 165, et seq., of the Tax Law, permitting foreclosures in rem, made certain that as much notice as possible should be given to the person, named on the tax rolls as is humanly possible, to afford the said person an opportunity to clear up the tax lien, notwithstanding the fact that the said statute was intended to enforce the collection of taxes due the municipality.

In the instant case, all notice delivered to this incompetent was a nullity, and it was impossible for her to understand the meaniag of the notice published, posted and mailed to her, for her mental faculties had so receded that five days after the delivery of the deed to the Town of Somers, in the within action, and order was made and entered in this Court, committing her to the Harlem Valley Hospital.

That in the petition requesting the appointment of a Committee, it is noted that this incompetent was the owner of several parcels of land, exclusive of the parcel in question, of a value of not less than $17,000.00, with income being derived therefrom, and that she had no relative or next of kin located within the State of New York. There was no [fol. 15] one present or available who was able to act in her behalf, to make payment to the Town for her delinquent taxes, or to clear up the tax lien defaults.

That I verily believe that the in rem provisions were not intended to take away property from a person so situated. That should this injustice remain uncorrected, this incompetent could ultimately become a public charge, subject to support and maintenance by the People of the State of New York.

That I have been advised by Adolph I. King, attorney in the within proceeding, that on September 22nd, 1953, he appeared before the Town Board of the Town of Somers, offering them the unpaid taxes, interest, penalties, foreclosure costs, attorneys fees and costs of maintenance from October 24th, 1952, to that date, in consideration for the return of a Deed to the Estate of the Incompetent. That this offer was rejected. That I verily believe and am informed that the unpaid taxes, interest, penalties, cost of foreclosure, attorneys fees and maintenance, amounts to approximately $480.00, and that the said property was offered for sale by the Town of Somers, first with a minimum bid price of $6500.00, and has been re-scheduled for sale on October 24th, 1953, at 10 A. M., with a minimum bid price of not less than $3500.00. That I believe that the purpose of the in rem proceedings was not intended to permit a municipality to profit by the misfortune of an individual situated as this incompetent, and that an opportunity should be given to have the default opened, the judgment vacated and the deed set aside for the reasons set forth herein.

[fol. 16] That the reason an Order to Show Cause is sought herein, is because a sale of the said property has been scheduled for October 24th, 1953, at 10 A. M., and I seek a stay of the said sale, pending the determination herein.

That no previous application for the relief sought herein has been made before any other Court or Judge.

Wherefore, I respectfully pray that an order be made and entered herein opening the default of the incompetent, Nora Brainard, vacating the judgment entered herein on the 8th day of September, 1953, and setting aside the Deed recorded herein on or about the 24th day of October, 1952, and for such other and further relief as to this Court may seem just and proper in the premises.

Edwin B. Covey.

(Sworn to October 21, 1953.)

[fol. 17] In County Court of Westchester County

Opinion by Donohoe, J.—December 3, 1953

Matter of foreclosure of Tax Liens pursuant to Article Seven A, Title Three of the Tax Law, by the Town of Somers, (List of Delinquent Taxes for 195[illegible]).

Motion to open default, vacate judgment of foreclosure and set aside deed and permit a defendant to appear in the above entitled in rem proceeding. The application is made by the committee of Nora Brainard, an incompetent, who prior to certification as a mental incompetent and adjudication as such, was the owner of one of the parcels of real property referred to in the above entitled proceedings. It is contended that the default of said Nora Brainard was excusable since she was a known incompetent at the time that proceedings were instituted and that by reason of her mental incapacity she did not know the nature of the proceeding and that the Court was not apprised of her condition and no one was appointed to act in her behalf. It is further contended that section 165-a of the Tax Law with respect to incompetents is unconstitutional in that the manner of giving notice to an incompetent is inadequate. In the first instance it should be pointed out that the procedure adopted by the applicant is improper. Subdivision 7, section 165-h of the Tax Law provides substantially that there is a conclusive presumption after two years from the date of the recording of the deed that the action and all proceed-

ings were regular and in accordance with the provisions of law relating thereto, and further provides "No action to set aside such deeds may be maintained unless the action is [fol. 18] commenced and a notice of pendency of the action is filed in the office of the proper County Clerk prior to the time that the presumption becomes conclusive * * *". In the case at bar no action to set aside the deed has been commenced and no lis pendens has been filed although the time that the presumption becomes conclusive has not expired. Under the provisions of subdivision 5, section 165-h of the Tax Law it is proved substantially that upon the execution of a deed all rights of infants, incompetents, &c., are barred and forever foreclosed. In *City of Utica* v. *Proite* (178 Misc. 925, aff'd. 288 N. Y. 477) the statute was held constitutional notwithstanding the specific argument in support of the unconstitutionality of the act that there was 'no protection of the rights of infants and incompetents". Under the doctrine enunciated in *City of Utica* v. *Proite* (supra) it must be determined that the applicant was not deprived of her constitutional rights and that the statute is valid. Motion denied. Submit order.

[fol. 19] NEW YORK SUPREME COURT, APPELLATE DIVISION, SECOND DEPARTMENT

[Title omitted]

STIPULATION AS TO CHANGING OF DATE OF THE FINAL ORDER IN NOTICE OF APPEAL—February 9, 1954

It is hereby stipulated and agreed by and between the attorneys for the respective parties hereto that the Notice of Appeal heretofore filed in the County Court, Westchester County, be and the same hereby is corrected to change the date of the final order from December 2, 1953 to December 16, 1953.

Dated, New York, N. Y., February 9th, 1954.

King & Tumminelli, Attorneys for Petitioner-Appellant. Stanley E. Anderson, Attorney for Respondent-Respondent.

[fol. 20] In County Court of Westchester County

Stipulation Waiving Certification (Omitted in Printing)

[fol. 21] In Supreme Court of New York, Appellate Division, Second Department

Notice of Appeal to Court of Appeals

[Title omitted]

Please take notice that, pursuant to leave granted by the Appellate Division, 2nd Department, in the above-entitled action, by an order duly entered on the 1st day of June, 1954, the above named Edwin B. Covey, Committee of the Person and Property of Nora Brainard, an incompetent, appellant herein, hereby appeals to the Court of Appeals from the order of affirmance herein entered in the office of the Clerk of the County of Westchester on the 30th day of April, 1954, pursuant to the order of the said Appellate Division, duly entered herein, and which order in all things by a divided Court affirmed the order of the County Court, Westchester County, entered herein on the 16th day of [fol. 22] December, 1953, and this appeal is from each and every part of said order.

Yours, etc., Adolph I. King, Attorney for Appellant, Office & P. O. Address, 521 Fifth Avenue, New York City, MUrray Hill 7-9050.

To: Stanley E. Anderson, Esq., Attorney for Respondent.

[fol. 23] In Supreme Court of New York, Appellate Division, Second Department

Order on Motion Granting Leave to Appeal to the Court of Appeals and Certifying Question of Law—June 1, 1954

[Title omitted]

The above named Edwin B. Covey, Committee of the person and property of Nora Brainard, an incompetent, the appellant in this proceeding having made a motion for

leave to appeal to the Court of Appeals from the order of this Court, entered on the 12th day of April, 1954, made as [fol. 24] a matter of law and not in the exercise of discretion, and the motion having been duly submitted:

Now on reading and filing the papers in support of and in opposition to said motion and all the papers upon which the apeal was heard; and due deliberation having been had thereon:

It is ordered that the said motion be and the same hereby is granted, and this Court hereby certifies that in its opinion a question of law is involved which ought to be received by the Court of Appeals, to wit:

Was the order of this Court, entered April 12, 1954, properly made as a matter of law?

Enter.

John J. Callahan, Clerk.

[fol. 25] In Supreme Court of New York, Appellate Division, Second Department

Order of Affirmance on Appeal From Order—April 12, 1954

[Title omitted]

The above named Edwin B. Covey, Committee of the person and property of Nora Brainard, an incompetent, petitioner, in this action having appealed to the Appellate Division of the Supreme Court from an order of the County Court of Westchester County, entered in the office of the [fol. 26] Clerk of the County of Westchester on the 16th day of December, 1953, denying the application to open the default; to vacate the judgment of foreclosure, and set aside the deed, etc., herein, and the said appeal having been argued by Mr. Angelo A. Tumminelli of Counsel for appellant, and argued by Mr. Harry H. Chambers of Counsel for respondent, and due deliberation having been had thereon; and upon the opinion and decision slip of the court herein, heretofore filed:

It is Ordered that the order so appealed from be and the same hereby is affirmed, without costs. Nolan, *P. J.*, Wen-

zel, MacCrate and Beldock, *JJ.*, concur; Adel, *J.*, dissents and votes to reverse the order and to grant the motion, with memorandum as contained in opinion and decision slip dated April 12th, 1954, herein.

Enter:

John J. Callahan, Clerk.

[fol. 27] In Supreme Court of New York, Appellate Division, Second Department

Opinion of Appellate Division

Appeal by the committee of an incompetent from an order of the County Court, Westchester County, denying his motion (1) to open a default in an rem tax foreclosure brought pursuant to Article VII-A, title 3 of the Tax Law; (2) to vacate the judgment of foreclosure entered therein, and (3) to set aside the deed delivered pursuant to the judgment. Order affirmed without costs. Upon the expiration of the time prescribed by the statute (Tax Law, sec. 165, et seq.) for redemption and answer, the rights of the parties, in view of the provisions of section 165-a of the Tax Law, became fixed and unalterable. The latter section is in the nature of a statute of limitations and precludes the court from extending the time to answer or redeem therein prescribed (*City of Peekskill* v. *Perry*, 272 App. Div., 940; *City of N. Y.* v. *Jackson, 140 Realty Corp.*, 279 App. Div., 668; *City of N. Y.* v. *Lynch*, 281 App. Div., 1038, aff'd —— N. Y., ——, decided March 4, 1954; *Keely* v. *Sanders*, 99 U. S., 441, 445-446; *Levy* v. *Newman*, 130 N. Y., 11, 13; *People ex. rel. Quargnto* v. *Moynahan*, 148 App. Div., 744, 746, aff'd on opinion below, 205 N. Y. 590; *City of New Rochelle* v. *Echo Bay Waterfront Corp.*, 268 App. Div., 182, 191, aff'd 294 N. Y., 678, cert. denied 326 U. S. 720). Nolan, *P. J.*, Wenzel, MacCrate and Beldock, *JJ.*, concur.

[fol. 28] Adel, *J.*, dissents and votes to reverse the order and to grant the motion, with the following memorandum: It appears without dispute that the taxpayer was incompetent for many years, to the knowledge of the town officials. Within a few days after the town took a deed to her

property for non-payment of taxes, the taxpayer was adjudicated incompetent and a committee of her person and property appointed. The committee promptly offered to pay the arrears, together with the costs and expenses of foreclosure, and to redeem the property. The property has not been sold by the town, and no rights of third persons are concerned. While it has been held that the provisions of the Tax Law are in the nature of a statute of limitations which preclude the court from extending the time to answer or redeem, I believe that the undisputed facts in this case call for the exercise of the equitable powers of the court by staying the town in its oppressive and unconscionable conduct. The town seeks not payment of the taxes due but profit by reason of the taxpayer's misfortune.

[fol. 29] In Supreme Court of New York, Appellate Division, Second Department

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Stipulation Waiving Certification of Record to Court of Appeals—September 17, 1954 (Omitted in Printing)

[fol. 30] In County Court of Westchester County,

In the Matter of the Foreclosure of Tax Liens, pursuant to Article Seven A, Title Three of the Tax Law, by the Town of Somers, Respondent-Appellee.

Edwin E. Covey, Committee of the Person and Property of Nora Brainard, an Incompetent, Petitioner-Appellant.

Notice of Appeal to the Supreme Court of the United States

I. Notice is hereby given that Edwin B. Covey, Committee of the Person and Property of Nora Brainard, an Incompetent, the Appellant above named, hereby appeals to the Supreme Court of the United States from the final order of the Court of Appeals of the State of New York

dated April 21, 1955, sustaining the validity under the Fourteenth Amendment of the United States Constitution, of Article VII-A, Title Three of the New York Tax Law and of the taking thereunder by the Town of Somers of the property involved, which final order was entered in this action on April 26, 1955, on a motion for re-argument and amendment of the Remittitur relative to the decision of the Court of Appeals rendered February 28, 1955.

This appeal is taken pursuant to 28 U.S.C., Section 1257(2).

II. The Clerk will please prepare a transcript of the record in this cause, for transmission to the Clerk of the Supreme Court of the United States, and include in said transcript the following:

1. Notice of Appeal to the Supreme Court of the United States.

[fol. 31] 2. Order of the Court of Appeals dated April 21, 1955.

3. Order of the Court of Appeals dated February 28, 1955, and

4. Record on Appeal to the Court of Appeals of the State of New York.

III. The following questions are presented by this appeal:

1. Whether the taking by the Town of Somers of the property of the Incompetent, Nora Brainard, was, on the facts presented in the Record, a deprivation of due process under the Fourteenth Amendment to the United States Constitution?

2. Whether the taking by the Town of Somers of the property of the Incompetent, Nora Brainard, was, on the facts presented in the Record, a denial of equal protection of the laws all of which is prohibited and ment of the United States Constitution?

3. Whether Article VII-A, Title Three of the New York Tax Law, and its application to the owners of property, are repugnant to the United States Constitution, in that each results in a deprivation of property without due process and denies such owners equal protection of the laws, all of which is prohibited and

invalid under Section I of the Fourteenth Amendment to the United States Constitution?

Adolph I. King Dodge Building Mahopac, N.Y., and Samuel M. Sprafkin and Mandel Matthew Einhorn 521 Fifth Avenue New York 17, N.Y. Attorneys for Appellant.

[fol. 32] Certificate of Service (Omitted in Printing)

[fol. 33] In the Court of Appeals of New York
Remittitur—Feb. 28, 1955

[fol. 34] In the Matter of the Foreclosure of Tax Liens, pursuant to Article Seven A, Title Three, of the Tax Law, by the Town of Somers, Respondent; Edwin B. Covey, Committee of the person and property of Nora Brainard, an incompetent, Appellant.

Be it Remembered, That on the 24th day of November in the year of our Lord one thousand nine hundred and fifty-four, Edwin B. Covey, Committee of the person and property of Nora Brainard, an incompetent, the appellant —in this cause, came here unto the Court of Appeals, by Adolph I. King, his attorney—, and filed in the said Court a Notice of Appeal and return thereto from the order of the Appellate Division of the Supreme Court in and for the Second Judicial Department. And Town of Somers, the respondent—in said cause, afterwards appeared in said Court of Appeals by Stanley E. Anderson, its attorney. Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

[fol. 35] Therefore, it is considered that the said order be affirmed, without costs. Question certified answered in the affirmative, as aforesaid. And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Appellate Division of the Supreme Court, Second Judicial Department, before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains

in the said Appellate Division, before the Justices thereof, &c.

Raymond J. Cannon, Clerk of the Court of Appeals of the State of New York.

Court of Appeals, Clerk's Office, Albany, February 28, 1955.

I Hereby Certify, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

Raymond J. Cannon, Clerk.

[fol. 36] In Court of Appeals of New York

[Title omitted]

Stay Order—April 21, 1955

A motion having heretofore been made herein upon the part of the appellant for a stay in the above cause and papers having been submitted thereon and due deliberation having been thereupon had, it is

Ordered, that the said motion be and the same hereby is granted and the Town of Somers stayed from proceeding with the sale of the subject property to and including the 25th of May, 1955, to enable the appellant to apply to the Supreme Court of the United States or to a Justice thereof for a stay in connection with an application for a writ of certiorari.

Gearon Kimball, Deputy Clerk.

[fol. 37] Whereupon, The said Court of Appeals having heard this cause argued by Mr. Adolph I. King, of counsel for the appellant—, and by Mr. Harry H. Chambers, of counsel for the respondent—, and after due deliberation had thereon, did order and adjudge that the order of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is affirmed, without costs. Question certified answered in the affirmative. And thereafter, this court, having denied a motion for reargument and granted

a motion to amend this remittitur, did order that there be added hereto the following: Upon the appeal herein there was presented and necessarily passed upon a question under the Constitution of the United States, viz., Whether the taking by the Town of Somers, of the property here involved, was, on this record, a deprivation of due process and equal protection of the laws under the Fourteenth Amendment The Court of Appeals held that there was no denial of any constitutional right of the petitioner (See Matter of Town of Somers v. Covey, 308 N.Y. 798).

And it was also further ordered, that the record aforesaid, and the proceedings in this Court, be remitted to the Appellate Division of the Supreme Court, Second Judicial Department, there to be proceeded upon according to law.

[fol. 38] In Court of Appeals of New York

[Title omitted]

Order Denying Motion for Reargument and Amending Remittitur—April 21, 1955

A motion for reargument or, in the alternative, to amend the remittitur in the above cause having been heretofore made upon the part of the appellant herein, papers having been submitted thereon and due deliberation having been thereupon had, it is

Ordered, that the said motion, insofar as it seeks reargument, be and the same hereby is denied, and it is

Further ordered, that the said motion, insofar as it seeks to amend the remittitur, be and the same hereby is granted. Return of the remittitur, requested and when returned it will be amended by adding thereto the following:

> Upon the appeal herein there was presented and necessarily passed upon a question under the Constitution of the United States, viz., Whether the taking by the Town of Somers, of the property here involved, was, on this record, a deprivation of due process and equal protection of the laws under the Fourteenth Amendment. The Court of Appeals held that there

[fol. 39] was no denial of any constitutional right of the petitioner (See Matter of Town of Somers v. Covey, 308 N.Y. 798).

And the Supreme Court is hereby requested to direct its Clerk to return said remittitur to this Court for amendment accordingly.

(Seal)

A Copy

Gearon Kimball, Deputy Clerk.

[fol. 40] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 41] SUPREME COURT OF THE UNITED STATES

ORDER NOTING PROBABLE JURISDICTION—NOV. 7, 1955

Appeal from the Court of Appeals of the State of New York.

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted and the case is transferred to the summary calendar.

November 7, 1955

No. 380

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

EDWIN B. COVEY, Committee of the Person and Property of NORA BRAINARD, an Incompetent,

Appellant,

—against—

TOWN OF SOMERS,

Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

JURISDICTIONAL STATEMENT

ADOLPH I. KING
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Counsel for Appellant

INDEX

Table of Cases Cited

OTHER AUTHORITIES CITED

IN THE

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EDWIN B. COVEY, Committee of the Person and Property of NORA BRAINARD, an Incompetent,

Appellant,

—against—

TOWN OF SOMERS,

Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

JURISDICTIONAL STATEMENT

Introduction

Appellant appeals from the final order of the New York Court of Appeals sustaining the validity of a statute of the State of New York under the Fourteenth Amendment of the United States Constitution and of the taking thereunder by the Town of Somers of the Incompetent's property. Appellant submits this Statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented.

Opinions Below

The opinion of the County Court (R. p. 17) has not been reported. A copy is attached as Appendix "A".

The prevailing and dissenting opinions of the Appellate Division of the New York Supreme Court (R. pp. 27 and 28) are reported in 283 App. Div. 883 and 129 N. Y. S. 2d 537. Copies are attached as Appendix "B".

No opinion was rendered by the New York Court of Appeals in affirming the order of the Appellate Division. The memorandum of such affirmance is reported in 308 N. Y. 798 and a copy is attached as Appendix "C". With respect to appellant's motion in the New York Court of Appeals for reargument and amendment of the remittitur, the memorandum decision of that Court denying reargument but amending the remittitur, is reported in 308 N. Y. 941 and is attached as Appendix "D".

Jurisdiction

(i) Pursuant to Article VII-A, Title 3 of the New York Tax Law, the Town of Somers proceeded to foreclose its tax lien on the incompetent's property and thereafter acquired title thereto by reason of the incompetent's default. After the appointment of Appellant, as Committee, he made application to open the default, to set aside the deed as an unlawful taking of property and repugnant to the provisions of the Fourteenth Amendment of the United States Constitution.

(ii) The New York Court of Appeals issued its order of affirmance on February 28, 1955. On appellant's motion for reargument and for amendment of the remittitur, that Court issued its final order on April 21, 1955, denying reargument but amending the remittitur. The notice of appeal was duly served and thereafter filed with the Clerk of Westchester County, who is also the Clerk of the County Court, possessed of the Record herein.

The motion to the New York Court of Appeals for reargument and for amendment of the remittitur having been timely made, accordingly, April 21, 1955, being the date of the order denying reargument and amending the remittitur, measures the time for taking the appeal to this Court. The notice of appeal herein having been served on July 14, 1955, and filed with the Clerk of Westchester County on July 15, 1955, the within appeal is timely (*Department of Banking* v. *Pink*, 317 U. S. 264; *Chicago G. W. R. Co.* v. *Basham*, 249 U. S. 164).

(iii) The jurisdiction of the Supreme Court to review the decision of the New York Court of Appeals by direct appeal is conferred by Title 28 U. S. C. Section 1257 (2).

(iv) The following decision sustains the jurisdiction of the Supreme Court to review the order on direct appeal in this case:

Dahnke-Walker Milling Co. v. *Bondurant*, 257 U. S. 282.

(v) The validity of Article VII-A, Title 3 of the New York Tax Law is involved and it is claimed by

appellant to be repugnant to the due process and equal protection clauses of the Fourteenth Amendment to the United States Constitution. This statute is found in McKinney's Consolidated Laws of New York, Book 59, Part I, Sections 165 through 165 i, pages 426 through 447. The text thereof is set forth in Appendix "E".

Questions Presented

1. Whether Article VII-A, Title 3 of the New York Tax Law and its application to owners of property, particularly a property owner known by the Town of Somers to be incompetent, are repugnant to the United States Constitution in that the act and its application results in a deprivation of property without due process and denies such known incompetent property owner equal protection of the laws, all of which is prohibited and invalid under Section 1 of the Fourteenth Amendment to the United States Constitution?

2. Whether the taking by the Town of Somers (a Tax District under such statute), of the property of the known incompetent, Nora Brainard, without provision for and the actual appointment of a competent person to protect her interests, was a deprivation of due process and a denial of equal protection of the laws under the Fourteenth Amendment to the United States Constitution?

3. In a judicial proceeding to foreclose such tax liens without providing for the appointment of a competent person to protect the known incompetent's interests, whether the taking by the Town of her

property, the value of which was known by it to be far in excess of the aggregate tax liens thereon, constituted a deprivation of due process and a denial of equal protection of the laws under the Fourteenth Amendment to the United States Constitution?

Statement of the Case

(Numerals in parentheses refer to the folio number in the certified record)

Nora Brainard, a resident in the Town of Somers in the State of New York, had been and was an incompetent for upwards of fifteen years and was known to and by the officials and citizens of the Town of Somers as a person without mental capacity to handle her affairs and to understand the meaning of any notices served upon her personally, by mail or by publication (20, 31, 38, 39).

Nora Brainard was a person of means and at all times financially able to meet her obligations. She owned four parcels of income producing improved real property, other than the one involved in the instant proceeding, and so could have complied with tax notices had she been able to comprehend the nature thereof (21, 39, 42). She appears to have lived alone, she had no relative or next-of-kin within the State. There was no one present or available who was able to act in her behalf, to make payment to the Town for her delinquent taxes, or to clear up the tax-lien defaults (20, 42, 43).

On May 8, 1952, the Town instituted the instant proceeding to foreclose its tax lien against the parcel of real property owned by the incompetent. Notice of

the commencement of such proceeding was given (a) by mail addressed to the incompetent, (b) by posting a notice in the Post Office, and (c) by publication in two local newspapers (18, 32, 33). When no party or owner filed any answer and the time fixed as the last day for redemption had expired, the Town attorney applied for and obtained an order appointing a Special Guardian to report and protect the interests of persons having any interest in this proceeding who may be in the military service (36, 37) but no such application was made by him for the appointment of a Special Guardian to protect the rights of a person known by him, the Town and its citizens to be incompetent.

On September 8, 1952, judgment of foreclosure was entered, and on October 24, 1952, a deed to the property was delivered to the Town (30).

Thereafter on February 13, 1953, appellant was appointed and qualified as Committee of the Person and Property of the Incompetent. Sometime prior to September 22, 1953, the Town offered the incompetent's property for sale with a minimum bid price of $6,500.00. However, the unpaid taxes, interest, penalties, costs of foreclosure, attorneys' fees and maintenance of the property, to September 22, 1953, aggregated but $480.00. On September 22, 1953, the Committee's attorney appeared before the Town Board and offered to repay the Town all such taxes, interest, penalties, costs of foreclosure, attorneys' fees and cost of maintenance in consideration for the return of the property to the incompetent's estate. This was refused. Thereafter, the Town re-scheduled the sale of the property with a minimum bid price of no less than $3,500.00 (44, 45).

How the Federal Question Is Presented

Appellant, as such Committee, then made application to the Westchester County Court where the judgment of foreclosure had been entered, to vacate the judgment and set aside the deed to the Town, and there urged that the Town had not apprised the Court of Nora Brainard's mental condition and that no one had been appointed to act on her behalf. Appellant also contended that the notice, although in compliance with the statute, was inadequate insofar as a known incompetent was concerned and therefore, the statute under which the Town acted was repugnant to the United States Constitution (22-25). However, the County Court held that the incompetent was not deprived of her constitutional rights and that the statute is valid (54).

Similarly, these points were urged again in the Appellate Division of the New York Supreme Court and then in the New York Court of Appeals. In each Court, the order was affirmed. On the motion for reargument in the Court of Appeals and for amendment of the remittitur, that Court denied reargument but amended the remittitur to show that upon the appeal "there was presented and necessarily passed upon a question under the Constitution of the United States, viz., whether the taking by the Town of Somers, of the property here involved, was, on this Record, a deprivation of due process and equal protection of the laws under the Fourteenth Amendment. The Court of Appeals held that there was no denial of any Constitutional right of the Petitioner". (Appendix "D", page 20, *infra.*)

Present Status of the Property

Pursuant to an order granted by the New York Court of Appeals, the Town of Somers was stayed from proceeding with the sale of the property and by subsequent stipulation of the parties, this stay has been extended pending the review and determination of the appeal to the Supreme Court of the United States.

The Questions Are Substantial

It is respectfully submitted that the questions herein presented are so substantial as to require plenary consideration, with briefs on the merits and oral argument, for their resolution.

Appellant readily recognizes that all persons within the taxing district are subject to taxation, including insane persons, and that it is no excuse for nonpayment of taxes that the owner of property is insane (*2 Cooley on Taxation,* 1257, Section 585, and *3 Cooley on Taxation,* 2532, Section 1272; 4th edition).

The tax statute in question, in effect, provides for a vesting of title in the taxing district which shall be absolute and beyond dispute. This is the equivalent of forfeiture (*3 Cooley on Taxation,* 2673, Section 1350). Such forfeiture occurs only after the institution of the judicial proceeding by the taxing district, the owner's failure to pay the aggregate amount of the lien or file an answer after the statutory notice therefor had been given. Here, the taxing district knew, when it was giving the *pro forma* statutory

notice to the incompetent, that she was incapable of understanding the nature thereof and incapable of protecting her property and interests therein. Such notice, although in compliance with the statute, was no notice at all. *Mullane* v. *Central Hanover Trust Company,* 339 U. S. 306.

Indeed, the Town with full knowledge that the incompetent's property would be forfeited to it for but a fraction of its true value in unpaid taxes, did not notify the Court of her mental condition. It should have done so. *28 American Jurisprudence,* Section 109, page 741. Had it done so, then the Court would have appointed one who could adequately protect her rights and interest in the proceeding. *44 Corpus Juris Secundum* 303, Section 141 and *American Mortgage Co.* v. *Dewey,* 106 App. Div. 389, 94 N. Y. S. 808. The strict application of the provisions of the statute by the Town thus has deprived the owner, known by it as an incompetent person, of substantial property rights.

The tax statute in question, although it carries the general title of "Foreclosure of the Tax Lien by Action in Rem" is novel in its approach to tax liens foreclosures. It has resulted in the vesting of absolute title to properties in taxing districts in the State of New York, the value of each of which is far in excess of the amount of liens being "foreclosed". (See *City of New York* v. *Nelson,* 309 N. Y. 94, where the City for a total arrears of $887.00 acquired properties assessed at $52,000.00, and one of which parcels was resold by it in excess of assessed valuation.) Furthermore, even if an answer is interposed, it may be stricken by summary judgment. (See *In re Village of Mamaroneck,* 273 App. Div. 777, 74 N. Y. S. 2d 836).

The constitutionality of this statute has not been passed on by this Court. Although, the New York Court of Appeals has had presented to it in several cases in addition to the instant case (*e. g., City of New York* v. *Nelson*, 309 N. Y. 94, *City of New Rochelle* v. *Echo Bay Waterfront Corp.*, 294 N. Y. 678) the argument that the statute is repugnant to the Fourteenth Amendment, it merely affirmed the orders of the lower Courts. However, it would appear that the New York Court of Appeals has its doubts with respect to the validity of this statute under the United States Constitution. *Lynbrook Gardens, Inc.* v. *Ullman*, 291 N. Y. 472, was an action for specific performance of a land contract. Pursuant to a contract, plaintiff tendered a deed to the realty to the purchaser who refused to accept it claiming that plaintiff's title was defective, since it had acquired it from a tax district under the statute in question and that such statute was unconstitutional. The Court of Appeals refused to decree specific performance. It recognized that the question of the validity of the statute had been challenged on substantial grounds. It stated, however, that only the Supreme Court of the United States can ultimately determine whether the statute violates the provisions of the Constitution of the United States. It said:

> "Even though this court were to sustain the validity of the statute, the Supreme Court of the United States might reach a different conclusion. A subsequent purchaser could at any time reject title on that ground and litigate that question in a different forum. A title which can be challenged in that manner is not marketable and decree of specific performance may not be rendered under such circumstances." (At page 447.)

As a result of this situation, we find that title companies in New York have hesitated and refused to insure titles derived from taxing districts under the statute.

For the foregoing reasons, we believe that the questions presented by this appeal are substantial and that they are of public importance.

Respectfully submitted,

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Mahopac, N. Y.

SAMUEL M. SPRAFKIN and
MANDEL MATTHEW EINHORN
521 Fifth Avenue
New York 17, N. Y.

Counsel for Appellant

APPENDIX A

OPINION OF COUNTY COURT

New York Law Journal—December 3, 1953.

Matter of foreclosure of Tax Liens pursuant to Article Seven A, Title Three of the Tax Law, by the Town of Somers, (List of Delinquent Taxes for 1952).

Motion to open default, vacate judgment of foreclosure and set aside deed and permit a defendant to appear in the above entitled in rem proceeding. The application is made by the committee of Nora Brainard, an incompetent, who prior to certification as a mental incompetent and adjudication as such, was the owner of one of the parcels of real property referred to in the above entitled proceedings. It is contended that the default of said Nora Brainard was excusable since she was a known incompetent at the time that proceedings were instituted and that by reason of her mental incapacity she did not know the nature of the proceeding and that the Court was not apprised of her condition and no one was appointed to act in her behalf. It is further contended that section 165-a of the Tax Law with respect to incompetents is unconstitutional in that the manner of giving notice to an incompetent is inadequate. In the first instance it should be pointed out that the procedure adopted by the applicant is improper. Subdivision 7, section 165-h of the Tax Law provides substantially that there is a conclusive presumption after two years from the date of the recording of the deed that the action and all proceedings were regular and in accordance with the provisions of law relating thereto, and further provides "No action to set aside such deeds may be

maintained unless the action is commenced and a notice of pendency of the action is filed in the office of the proper County Clerk prior to the time that the presumption becomes conclusive * * *". In the case at bar no action to set aside the deed has been commenced and no lis pendens has been filed although the time that the presumption becomes conclusive has not expired. Under the provisions of subdivision 5, section 165-h of the Tax Law it is proved substantially that upon the execution of a deed all rights of infants, incompetents, &c., are barred and forever foreclosed. In *City of Utica* v. *Proite* (178 Misc. 925, aff'd. 288 N. Y. 477) the statute was held constitutional notwithstanding the specific argument in support of the unconstitutionality of the act that there was "no protection of the rights of infants and incompetents". Under the doctrine enunciated in *City of Utica* v. *Proite* (supra) it must be determined that the applicant was not deprived of her constitutional rights and that the statute is valid. Motion denied. Submit order.

APPENDIX B

PREVAILING OPINION OF APPELLATE DIVISION

238 App. Div. 883, 129 N. Y. S. 2d 537

Appeal by the committee of an incompetent from an order of the County Court, Westchester County, denying his motion (1) to open a default in an rem tax foreclosure brought pursuant to Article VII-A, title 3 of the Tax Law; (2) to vacate the judgment of foreclosure entered therein, and (3) to set aside the deed delivered pursuant to the judgment. Order affirmed without costs. Upon the expiration of the time prescribed by the statute (Tax Law, sec. 165, et seq.) for redemption and answer, the rights of the parties, in view of the provisions of section 165-a of the Tax Law, became fixed and unalterable. The latter section is in the nature of a statute of limitations and precludes the court from extending the time to answer or redeem therein prescribed (*City of Peekskill* v. *Perry*, 272 App. Div., 940; *City of N. Y.* v. *Jackson, 140 Realty Corp.*, 279 App. Div., 668; *City of N. Y.* v. *Lynch*, 281 App. Div., 1038, aff'd —— N. Y., ——, decided March 4, 1954; *Keely* v. *Sanders*, 99 U. S., 441, 445-446; *Levy* v. *Newman*, 130 N. Y., 11, 13; *People ex. rel. Quaranto* v. *Moynahan*, 148 App. Div., 744, 746, aff'd on opinion below, 205 N. Y. 590; *City of New Rochelle* v. *Echo Bay Waterfront Corp.*, 268 App. Div., 182, 191, aff'd 294 N. Y., 678, cert. denied 326 U. S. 720). Nolan, *P. J.*, Wenzel, MacCrate and Beldock, *JJ.*, concur.

Appendix B

DISSENTING OPINION

Adel, *J.*, dissents and votes to reverse the order and to grant the motion, with the following memorandum: It appears without dispute that the taxpayer was incompetent for many years, to the knowledge of the town officials. Within a few days after the town took a deed to her property for non-payment of taxes, the taxpayer was adjudicated incompetent and a committee of her person and property appointed. The committee promptly offered to pay the arrears, together with the costs and expenses of foreclosure, and to redeem the property. The property has not been sold by the town, and no rights of third persons are concerned. While it has been held that the provisions of the Tax Law are in the nature of a statute of limitations which preclude the court from extending the time to answer or redeem, I believe that the undisputed facts in this case call for the exercise of the equitable powers of the court by staying the town in its oppressive and unconscionable conduct. The town seeks not payment of the taxes due but profit by reason of the taxpayer's misfortune.

APPENDIX C

MEMORANDUM DECISION

308 N. Y. 798, 125 N. E. 2d 862

TOWN OF SOMERS,

Respondent,

v.

EDWIN B. COVEY, Committee of the Person and Property of Nora Brainard, an incompetent,

Appellant.

Court of Appeals of New York.

Feb. 28, 1955.

Appeal from Supreme Court, Appellate Division, Second Department, 283 App. Div. 883, 129 N. Y. S. 2d 537.

Proceeding in the matter of the foreclosure of tax liens, pursuant to Article Seven A, Title Three, of the Tax Law, Consol. Laws, c. 60, § 165 et seq., by the Town of Somers, wherein committee of the person and property of an incompetent made a motion to open a default, to vacate judgment of foreclosure, and to set aside deed delivered pursuant to judgment.

The County Court, Westchester County, John P. Donohoe, J., entered an order denying the motion, and the committee appealed.

The Appellate Division, 283 App. Div. 883, 129 N. Y. S. 2d 537, on April 12, 1954 affirmed the order and held that on expiration for time prescribed by

statute for filing of answer and redemption from foreclosure of tax lien by action in rem, rights of parties became fixed and unalterable, and the time for answering or redemption could not be extended by the court. Adel, *J.*, dissented.

The Appellate Division, 283 App. Div. 883, 131 N. Y. S. 2d 450, denied motion for reargument, granted motion for leave to appeal to the Court of Appeals, and certified question: "Was the order of this court, entered April 12, 1954, properly made as a matter of law?"

The committee appealed to the Court of Appeals, contending that the County Court was not precluded from extending time for redemption or answer, and that statutory limitation of time, if any, to redeem or answer, was tolled by virtue of the known mental condition of the incompetent, and that its operation was suspended by reason of the oppressive and unconscionable conduct of the town, and that undisputed facts warranted exercise of judicial discretion in favor of opening default of incompetent and permitting committee to redeem or answer, and that the Tax Law, § 165 et seq., insofar as it is applicable to known incompetents, is unconstitutional.

Adolph I. King, New York City (Samuel M. Spratkin, New York City, of counsel), for petitioner-appellant.

Stanley E. Anderson, Mount Kisco (Harry H. Chambers, New York City, of counsel), for respondent-respondent.

Order affirmed, without costs. Question certified answered in the affirmative.

All concur.

APPENDIX D

MEMORANDUM DECISION

308 N. Y. 941, 127 N. E. 2d 90

TOWN OF SOMERS,

Respondent,

v.

EDWIN B. COVEY, committee of the person and property of Nora Brainard, an incompetent,

Appellant.

Court of Appeals of New York.

April 21, 1955.

Appeal from Supreme Court, Appellate Division, Second Department, 283 App. Div. 883, 129 N. Y. S. 2d 537.

Proceeding in the matter of the foreclosure of tax liens pursuant to Article Seven-A, Title Three, of the Tax Law, Consol. Laws, c. 60, § 165 et seq., by the Town of Somers. The committee of an incompetent made a motion to open a default and to vacate judgment of foreclosure, and to set aside deed delivered pursuant to judgment.

The County Court, Westchester County, John P. Donohoe, *J.*, entered an order denying the motion, and the committee appealed.

The Appellate Division, 283 App. Div. 883, 129 N. Y. S. 2d 537, on April 12, 1954, affirmed the order,

and held that on expiration for time prescribed by statute for filing of answer and redemption from foreclosure of tax lien by action in rem, rights of parties became fixed and unalterable, and that time for answering or redemption could not be extended by court. Adel, *J.*, dissented.

The Appellate Division, 283 App. Div. 1058, 131 N. Y. S. 2d 450, denied motion for reargument and granted motion for leave to appeal to the Court of Appeals. The following question was certified: "Was the order of this court, entered April 12, 1954, properly made as a matter of law? The decision and order of this court were made as a matter of law and not in the exercise of discretion."

The Court of Appeals, *Town of Somers* v. *Covey*, 308 N. Y. 798, 125 N. E. 2d 862, affirmed the order

Motions were made in the Court of Appeals for reargument, to amend the remittitur, and to stay the Town of Somers from proceeding with the sale of the property.

Motion for reargument denied. Motion to amend the remittitur requested and when returned it will be amended by adding thereto the following: Upon the appeal herein there was presented and necessarily passed upon a question under the Constitution of the United States, as follows: Whether the taking by the Town of Somers, of the property here involved, was, on this record, a deprivation of due process and equal protection of the laws under the Fourteenth Amendment. The Court of Appeals held that there was no denial of any constitutional right of the petitioner. See *Town of Somers* v. *Covey*, 308 N. Y. 798, 125 N. E. 2d 862.

Appendix D

Motion staying the Town of Somers from proceeding with the sale of the subject property granted to and including the 25th of May, 1955, to enable the appellant to apply to the Supreme Court of the United States or to a Justice thereof for a stay in connection with an application for a writ of certiorari.

APPENDIX E

(Applicable Statute)

TITLE 3: FORECLOSURE OF THE TAX LIEN BY ACTION IN REM

§ 165. FORECLOSURE BY ACTION IN REM

Whenever it shall appear that a tax district owns a tax lien which has been due and unpaid for a period of at least four years from the date on which the tax, assessment or other legal charges represented thereby became a lien, such tax lien, except as otherwise provided by this title, shall be summarily foreclosed by the tax district in the manner provided in this title, notwithstanding the provisions of any general, special or local law and notwithstanding any omission to hold a tax sale prior to such foreclosure. Ownership of a transfer of tax lien or of a tax sale certificate or of any other instrument evidencing such tax lien by the tax district issuing the same shall be evidence of the fact that the tax, assessment or other legal charges represented thereby have not been paid to the tax district or assigned by it.

§ 165-a. FILING OF LIST OF DELINQUENT TAXES

1. Within six months after the date of adoption of a resolution electing to adopt title three hereof and annually thereafter, the collecting officer of such tax district shall file in the office of the clerk of the county in which the property subject to such tax liens is situated, a list of all parcels of property, except those excluded from such list as hereinafter provided, affected by unpaid tax liens held and owned by such tax district which on the date of filing shall have been unpaid for a period of at least four years or more after the date when the tax, assessment or other legal charge represented thereby became a lien, provided, however, in a tax district having a population of more than fifty thousand according to the latest federal census all such parcels need not be included in the list first filed after the adoption of such resolution but may be included in more than one list, in which event each such list shall comprise all such parcels within a particular area in such district, except those excluded from such list as hereinafter provided. Such area shall constitute an existing geographical area such as a city, town, village, ward, section or other appropriate area bounded or defined by law. All lists covering all such parcels in all such areas in such district shall be filed within one year from the date of adoption of the resolution of election. Before filing any list of parcels of property in any year, the collecting officer with the approval of the governing body of the tax district may exclude particular parcels therefrom. The collecting officer when requesting approval for the exclusion of any particular parcel shall state the reasons

therefor in writing. No parcel shall be excluded from any such list for any reason, other than the following: (1) that a question has been raised by a person having an interest in such parcel as to the validity of the tax lien affecting such parcel, or (2) that the tax district has agreed to accept payment of delinquent taxes, assessments or other legal charges in installments of at least two years of such arrears with each year of current taxes, assessments or other legal charges and there has been no default in such installments, or (3) that an agreement has been duly made and executed and filed with the tax district for the payment of such delinquent taxes, assesments[1] or other legal charges in installments, the first of which shall be in an amount equal to at least twenty-five per centum of such arrears payable upon the making and filing of the installment agreement, and the balance of which shall be in amounts equal to at least two years of such arrears and payable with each year of current taxes, assessments or other legal charges and there has been no default in such installments, or (4) that within two years last passed the tax district had sold or assigned a tax lien owned and held by the tax district to a person who had not completed all of the proceedings necessary to enforce such tax lien. The collecting officer shall transmit a list of all parcels within the particular area selected which are affected by tax liens which shall have been unpaid for a period of at least four years and an additional list which shall designate which of the parcels on the first list should be excluded. Such list of all parcels and such additional

[1] So in original. Probably should read "assessments".

list, if any, shall not be acted upon at the meeting of the governing body at which they appear on the calendar for the first time, nor shall such body approve the exclusion of any parcel at any succeeding meeting unless one week has elapsed after the meeting when such exclusion was first submitted for approval. The approval of such exclusion by the governing body shall be by resolution recorded in its minutes stating the reason therefor. All parcels included in any list shall be numbered serially. The collecting officer shall file a certified copy of each list in the office of such collecting officer, in the office of the attorney for such tax district and in the office of the collecting officer of any other tax district having a right to assess any of the parcels described upon such list. The inadvertent failure of the collecting officer to include all parcels in such list, or where more than one list is filed all such parcels in the designated area, shall not affect the validity of any proceeding brought pursuant to this title. Each such list shall be known and designated as the "List of Delinquent Taxes" and shall bear the following caption:

"..... court, ... county. In the matter of foreclosure of tax liens pursuant to article seven-a, title three of the tax law by ..... (insert name of tax district.) List of delinquent taxes". Where the list comprises parcels in a particular area the caption shall also generally describe the area covered by the list. Each list shall also contain as to each parcel, the following:

(a) A brief description sufficient to identify each parcel affected by such tax lien. A description by

stating the lot, block and section number or other identification numbers of any parcel upon a tax map, or a lot number or other identification number of any tract, the map of which is filed in the county clerk's or register's office, shall be a sufficient description.

(b) The name of the last known owner of such parcel as the same appears on the assessment roll of the tax district for the year preceding the calendar year in which such list is filed.

(c) A statement of the amount of each tax lien upon such parcel including those which shall have been due and unpaid for less than four years together with the date or dates from which and the rate and rates at which interest and penalties shall be computed.

Such list of delinquent taxes shall be verified by the affidavit of the collecting officer. The filing of such list of delinquent taxes in the office of the clerk of the county in which the property subject to such tax liens is situated shall constitute and have the same force and effect as the filing and recording in said office of an individual and separate notice of pendency of action and as the filing in the county court of such county or, in the city of New York, in the supreme court of such county of an individual and separate complaint by the tax district against the real property therein described, to enforce the payment of the delinquent taxes, assessments or other lawful charges which have accumulated and become liens against such property.

Each county clerk with whom such list of delinquent

taxes is filed shall index it in a separate book kept for that purpose to the name of the taxing district filing such list which shall constitute due filing, recording and indexing of such notice in lieu of any other requirement under section one hundred twenty-two of the civil practice act or otherwise. The county clerk shall be entitled to a fee of ten dollars for such receiving, filing and indexing of each such list in lieu of any other fees to which he might otherwise be entitled for such services except in counties having a block and section system of indexing lis pendens and in such counties the fee for filing shall be as provided by law.

The county court, except in the counties of the city of New York, and in those counties, the supreme court, is hereby given jurisdiction of actions authorized by this title.

2. Every person including a tax district other than the one foreclosing having any right, title or interest in, or lien upon, any parcel described in such list of delinquent taxes may redeem such parcel by paying all of the sums mentioned in such list of delinquent taxes before the expiration of the redemption period mentioned in the notice published pursuant to section one hundred sixty-five-b, or may serve a duly verified answer upon the attorney for the tax district setting forth in detail the nature and amount of his interest and any defense or objections to the foreclosure of the tax lien. The caption of such answer shall contain a reference to the serial number or numbers of the parcels concerned. Such answer must be filed in the office of the county clerk and served on the attorney for the tax district foreclosing within twenty days after the date mentioned in the notice

published pursuant to section one hundred sixty-five-b as the last day for redemption. In the event of failure to redeem or answer by any person having the right to redeem or answer such person shall be in default and shall be barred and forever foreclosed of all his right, title and interest in and to the parcels described in such list of delinquent taxes and a judgment in foreclosure may be taken as herein provided. Upon redemption as permitted by this section, the person redeeming shall be entitled to a certificate thereof from the collector of the tax district describing the property in the same manner as it is described in such list of delinquent taxes. Upon the filing of such certificate with the county clerk, the county clerk shall note the word "redeemed" and the date of such filing opposite the description of said parcel on such list. Such notation shall operate to cancel the notice of pendency of action with respect to such parcel.

§ 165-b. PUBLIC NOTICE OF FORECLOSURE

Upon the filing of such list in the office of the county clerk, the collecting officer forthwith shall cause a notice of foreclosure to be published at least once a week for six successive weeks in two newspapers designated by him and published in the tax district. If there is only one newspaper published in such tax district, the collecting officer shall cause such notice to be published in such newspaper and in addition thereto in one other newspaper published in the county in which such tax district is situated. If no newspaper is published in the tax district, the collecting officer shall cause such notice to be published in

two newspapers published in the county in which such tax district is situated and circulating in such tax district. If only one newspaper is published in said county then the collecting officer shall cause such notice to be published in such newspaper and also in a newspaper published in an adjoining county, and if no newspaper is published in such county, he shall cause the same to be published in two newspapers published in an adjoining county. In New York and Bronx counties the newspapers to be designated for the publication of such notice or any other public notice required pursuant to this article shall be the daily law journal designated by the justices of the appellate division of the first judicial department and another newspaper designated by said justices pursuant to the provisions of subdivisions one and two of section ninety-seven of the judiciary law. Such notice shall be in substantially the following form: ..... court, ... county.

NOTICE OF FORECLOSURE OF TAX LIENS BY .....
..... (here insert name of tax district)
BY ACTION IN REM

Please take notice that on the ..... day of ....., ..., the ..... (insert name of collecting officer) of ..... (insert name of tax district) pursuant to law filed with the clerk of ..... county, a list of parcels of property affected by unpaid tax liens held and owned by said ..... which on such date had been unpaid for a period of at least four years after the date when the tax, assessment or other legal charge represented thereby became a lien. Said list contains as to each such parcel, (a) a brief description

of the property affected by such tax lien, (b) the name of the last known owner of such property as the same appears on the assessment roll of said ..... for the last calendar year, or a statement that the owner is unknown if such be the case, (c) a statement of the amount of such tax lien upon such parcel including those which shall have been due for less than four years together with the date or dates from which, and the rate or rates at which, interest and penalties shall be computed.

All persons having or claiming to have an interest in the real property described in such list of delinquent taxes are hereby notified that the filing of such list of delinquent taxes constitutes the commencement by said ..... of an action in the ..... court, ... county to foreclose the tax liens therein described by a foreclosure proceeding in rem and that such list constitutes a notice of pendency of action and a complaint by the said ..... against each piece or parcel of land therein described to enforce the payment of such tax liens. Such action is brought against the real property only and is to foreclose the tax liens described in such list.

No personal judgment shall be entered herein for such taxes, assessments or other legal charges or any part thereof.

This notice is directed to all persons having or claiming to have an interest in the real property described in such list of delinquent taxes and such persons are hereby notified further that a certified copy of such list of delinquent taxes has been filed in the office of the ..... (here insert title of the collecting officer) of said ..... and will remain open for public inspection up to and

including the ..... day of ..... (here insert a date at least seven weeks from the date of the first publication of this notice), which date is hereby fixed as the last day for redemption.

And take further notice that any person having or claiming to have an interest in any such parcel and the legal right thereto may on or before said date redeem the same by paying to the said ..... (here insert title of collecting officer) the amount of all such unpaid tax liens thereon and in addition thereto all interest and penalties which are a lien against such real property, computed to and including the date of redemption. In the event that such taxes are paid by a person other than the record owner of such property, the person so paying shall be entitled to have the tax liens affected thereby satisfied of record or to receive an assignment of such tax liens evidenced by a proper written instrument.

Every person having any right, title or interest in or lien upon any parcel described in such list of delinquent taxes may serve a duly verified answer upon the attorney for the ..... (here insert name of tax district) setting forth in detail the nature and amount of his interest and any defense or objection to the foreclosure. Such answer must be filed in the office of the county clerk and served upon the attorney for the tax district foreclosing within twenty days after the date above mentioned as the last day for redemption. In the event of failure to redeem or answer by any person having the right to redeem or answer, such person shall be forever barred and foreclosed of all his right, title and interest and equity of redemption in and to the parcel described

in such list of delinquent taxes and a judgment in foreclosure may be taken by default.

.....

.....

(Name of office of collecting officer)

.....

Attorney for..... (tax district)

Address:

The collecting officer shall on or before the date of the first publication of the notice above set forth cause a copy of such notice to be posted once in the office of the collecting officer, in the county court house of the county in which the property subject to such tax lien is situated and in three other conspicuous places within such tax district and shall cause a copy of such notice to be mailed to the last known address of each owner of property affected thereby, as the same appears upon the records in the office of the collecting officer, and in the event that the name or address of such owner does not appear in such records, the taxing officer shall so state in an affidavit which shall be filed in the office of the county clerk. The collecting officer shall cause to be inserted with or attached to such notice a statement substantially as follows:

To the party to whom the enclosed notice is addressed:

You are the presumptive owner or lienor of one or more of the parcels mentioned and described in the list referred to in the enclosed notice.

Unless the taxes and assessments and all other legal charges are paid, or an answer interposed, as provided by statute, the ownership of said property will in

due course pass to .....
(name of municipality foreclosing)
as provided by the tax law of the state of New York.

Dated,

.....
Collecting officer

§ 165-c. NOTICE TO MORTGAGEE OR LIENOR

At any time after the enactment of this article, any owner of real property in such tax district, any mortgagee thereof, or any person having a lien or claim thereon, or interest therein may file with the collecting officer a notice stating his name, residence and post office address and a description of the parcel in which such person has an interest, which notice shall continue in effect for the purposes of this section for a period of five years, unless earlier cancelled by such person. The collecting officer shall mail to each such person forthwith after the completion and filing of the list of delinquent taxes as herein provided, a copy of each notice required under this title and affecting such parcel. The failure of the collecting officer to mail such notice as herein provided shall not affect the validity of any proceeding brought pursuant to this title.

§ 165-d. FILING OF AFFIDAVITS

All affidavits of filing, publication, posting, mailing or other acts required by this title shall be made by the person or persons performing such acts and shall be filed in the office of the county clerk of the county

in which the property subject to such tax lien is situated and shall together with all other documents required by this title to be filed in the office of such county clerk, constitute and become a part of the judgment roll in such foreclosure action.

§ 165-e. TRIAL OF ISSUES

If a duly verified answer is served upon the attorney for such tax district within the period mentioned in the notice published pursuant to section one hundred sixty-five-b the court shall summarily hear and determine the issues raised by the complaint and answer in the same manner and under the same rules as it hears and determines other actions, except as in this act otherwise provided. Upon such trial, proof that such tax was paid, together with any interest or penalty which may have been due, or that the property was not subject to tax shall constitute a complete defense. Whenever an answer is interposed as herein provided, the defendant shall have an absolute right to the severance of the action as to any parcel or parcels of land in which he has an interest, upon written demand therefor filed with or made a part of his answer.

§ 165-f. PREFERENCE OVER OTHER ACTIONS

Any action brought pursuant to this title shall be given preference over all other causes and actions, and no such action shall be referred except to an official referee and the supreme court and county court are hereby given jurisdiction to make such reference.

§ 165-g. PRESUMPTION OF VALIDITY

It shall not be necessary for the tax district to plead or prove the various steps, procedures and notices for the assessment and levy of the taxes, assessments or other lawful charges against the lands set forth in the list of delinquent taxes and all such taxes, assessments or other lawful charges and the lien thereof shall be presumed to be valid. A defendant alleging any jurisdictional defect or invalidity in the tax or in the sale thereof must particularly specify in his answer such jurisdictional defect or invalidity and must affirmatively establish such defense. The provisions of this title shall apply to and be valid and effective with respect to all defendants even though one or more of them be infants, incompetents, absentees or non-residents of the state of New York.

§ 165-h. FINAL JUDGMENT

(1) The court shall have full power to determine and enforce in all respects the priorities, rights, claims and demands of the several parties to said action, as the same shall exist according to law, including the priorities, rights, claims and demands of the defendants as between themselves, and in a proper case to direct a sale of such lands and the distribution or other disposition of the proceeds of the sale. The court shall further determine upon proof and shall make findings upon such proof whether there has been due compliance by the tax district with the provisions of this title.

(2) Where as to any parcel included in the list described in section one hundred sixty-five-a of this

chapter an answer has been interposed by a party other than a tax district and the court shall determine that such party has any right, title, interest, claim, lien or equity of redemption in such parcel, the court shall make a final judgment directing the sale of such parcel.

(3) Where as to any parcel an answer has been interposed by another tax district and the court shall determine that such other tax district has an interest in such parcel and no party (other than a tax district) shall have answered, then and in that event the tax districts having an interest in such parcel may by agreement between themselves provide (a) for a conveyance without sale of any such parcel to one of such tax districts free and clear of any right, title or interest in or lien upon such parcel of such tax districts, or (b) for a conveyance without sale of any such parcel to one of such tax districts subject to any right, title or interest in or lien upon such parcel of such other tax district or districts. In either of such events the court shall in its judgment expressly dispense with the sale and direct the making and execution of a conveyance by the collecting officer in accordance with such agreement. In the absence of such an agreement the court shall make a final judgment directing the sale of such parcel.

(4) Any sale directed by the court shall be at public auction by the collecting officer. Public notice thereof shall be given once a week for at least three successive weeks in a newspaper published in the tax district, if any, or, if none, in a newspaper published in the county in which such tax district is situated.

The collecting officer shall receive no fee or compensation for such service. The description of the parcel offered for sale in such notice shall be that contained in the list of delinquent taxes with such other description, if any, as the court may direct.

(5) In directing any conveyance pursuant to this title, the judgment shall direct the collecting officer of the tax district to prepare and execute a deed conveying title to the parcel or parcels concerned. Said title shall be full and complete in the absence of an agreement between tax districts as herein provided that it shall be subject to the tax liens of one or more tax districts. Upon the execution of such deed the grantee shall be seized of an estate in fee simple absolute in such parcel unless expressly made subject to tax liens of a tax district as herein provided, and all persons, including the state of New York, infants, incompetents, absentees and non-residents, except such tax district, who may have had any right, title, interest, claim, lien or equity of redemption in or upon such parcel, shall be barred and forever foreclosed of all such right, title, interest, claim, lien or equity of redemption.

(6) The court shall make a final judgment awarding to such tax district the possession of any parcel described in the list of delinquent taxes not redeemed as provided in this title and as to which no answer is interposed as provided herein. In addition thereto such judgment shall contain a direction to the collecting officer of the tax district to prepare, execute and cause to be recorded a deed conveying to such tax district full and complete title to such lands. Upon the execution of such deed, the tax district

shall be seized of an estate in fee simple absolute in such land and all persons, including the state of New York, infants, incompetents, absentees and non-residents who may have had any right, title, interest, claim, lien or equity of redemption in or upon such lands shall be barred and forever foreclosed of all such right, title, interest, claim, lien or equity of redemption.

7. Every deed given pursuant to the provisions of this section shall be presumptive evidence that the action and all proceedings therein and all proceedings prior thereto from and including the assessment of the lands affected and all notices required by law were regular and in accordance with all provisions of law relating thereto. After two years from the date of the record of such deed, the presumption shall be conclusive, unless at the time that this subdivision takes effect the two-year period since the record of the deed has expired or less than six months of such period of two years remains unexpired, in which case the presumption shall become conclusive six months after this subdivision takes effect. No action to set aside such deed may be maintained unless the action is commenced and a notice of pendency of the action is filed in the office of the proper county clerk prior to the time that the presumption becomes conclusive as aforesaid.

§ 165-i. WITHDRAWAL OF PARCELS FROM FORECLOSURE

The collecting officer of any tax district may at any time prior to final judgment withdraw any parcel

from a proceeding under this title with the approval by resolution of the governing body stating the reason therefor. No parcel shall be withdrawn from such proceedings except for one of the reasons set forth in subdivision one of section one hundred sixty-five-a as a reason for exclusion of a parcel from a list of delinquent taxes. Upon such withdrawal the tax liens on any parcel so withdrawn shall be and remain the same as if no action had been instituted and the collecting officer shall issue a certificate of withdrawal which shall be filed with the county clerk who shall note the word "withdrawn" and the date of such filing opposite the description of such parcel on the list. Such certificate may include one or more parcels appearing on any list. Such notice shall operate to cancel the notice of pendency of action with respect to any such parcel.

No. 380

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

EDWIN B. COVEY, Committee of the Person and Property of NORA BRAINARD, an Incompetent,

Appellant,

—against—

TOWN OF SOMERS,

Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

APPELLANT'S REPLY TO MOTION TO DISMISS

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ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

APPELLANT'S REPLY TO MOTION TO DISMISS

(1) Re: Appellee's argument that the appeal does not present substantial questions.

The Appellee states at Page 2, that the question of constitutionality of the statute was presented to this Court in the City of New Rochelle and the Lynbrook Gardens cases, and that certiorari was denied in each case. Of course, the denial of certiorari does not indicate that this Court either considered or passed upon the constitutional questions (*United States* v. *Carver*, 260 U. S. 482). In any event, the precise question presented by the instant record has never been presented nor passed upon by this Court.

The Appellee, in its argument under this caption, now seeks to create the impression or suggestion that the taxpayer may not have been incompetent after all.

It now claims that that was a matter "for determination by a competent physician".

That the taxpayer's incompetency was known to the taxing officers and officials of the Town specifically was alleged at folio 31, and is undisputed in the certified Record. The Appellee in the lower courts did not submit anything to put this in issue. Indeed, it could not. It ill befits the Town at this stage of the proceedings, to venture the suggestion that this might have been an issue in the lower court.

(2) Re: Appellee's argument that the judgment rests upon an adequate non-federal basis.

Appellee contends that Appellant should not have proceeded by motion in the In Rem proceeding, but should have instituted a separate or plenary action and filed a lis pendens as suggested by the County Court in its opinion (Jurisdictional Statement, Page 14). Since the Committee still had time within which to comply but failed and refused to proceed in the manner suggested, Appellee contends that the judgment rests on an adequate non-federal basis.

That this contention is erroneous is illustrated by the following chronology:

The opinion and decision of the County Court appeared on December 3, 1953. On February 1, 1954, the Appellate Division in *Nelson et al.* v. *City of N. Y.*, 283 App. Div. 722, 127 N. Y. S. (2) 854, directly disapproved of and rejected the separate or plenary action suggestion. It relegated the taxpayers to a motion in the In Rem proceeding to open their default and to take such proceedings therein as to enforce whatever rights and remedies they may have.

(See Appendix F.) It is precisely what had been done previously by the Appellant in the case at bar.

It was that same appellate court which on April 12, 1954 passed on the appeal from the County Court in the case at bar. Neither the prevailing nor dissenting opinion made mention of the separate action suggestion. It is reasonable to assume that that court found it unnecessary to do so in view of its memorandum decision in *Nelson et al.* v. *City of N. Y.* (supra), published but two and one-half months previously.

Parenthetically, the taxpayers in the *Nelson* case then moved in the In Rem proceeding to open their default, etc. That motion was denied in the lower courts and affirmed by the New York Court of Appeals in *City of N. Y.* v. *Nelson,* 309 N. Y. 94 (Jurisdictional Statement, Page 10). We have been informed by the taxpayers' attorneys in that case that an appeal is being taken to this Court. There, too, the validity of the taxing statute was attacked as being repugnant to the provisions of the Fourteenth Amendment.

(3) The other matters and points raised in Appellee's motion to dismiss are covered in our Jurisdictional Statement.

Respectfully submitted,

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APPENDIX F

Nelson, et al. v. *City of New York*
283 App. Div. 722
127 N. Y. S. (2) 854 (2nd case)

Supreme Court, Appellate Division, Second Department. Feb. 1, 1954. William P. Jones, New York City, for appellants. Meyer Scheps, New York City, for respondent. In an action pursuant to article 15, Real Property Law and for other relief with respect to two parcels of property located respectively in Kings and Queens Counties, title to which has been acquired by defendant through in rem foreclosures, plaintiffs, former owners, appeal from a judgment entered on an order granting defendant's motion for judgment on the pleadings and for summary judgment. Judgment unanimously affirmed, without costs, and without prejudice to plaintiffs taking such proceedings as they may be advised with respect to moving in the foreclosure action to open their default and with respect to enforcing in that action whatever rights or remedies plaintiffs may have. No opinion.

IN THE

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ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF FOR APPELLANT

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INDEX.

Table of Cases Cited

Other Authorities Cited

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Appellee.

BRIEF FOR APPELLANT

Opinions Below

The opinion of the Westchester County Court of New York (R. 12, 13) has not been reported.

The prevailing and dissenting opinions of the Appellate Division of the New York Supreme Court (R. 16, 17) are reported in 283 App. Div. 883 and 129 N. Y. S. 2d 537.

No opinion was rendered by the New York Court of Appeals in affirming the order of the Appellate Division. The memorandum of such affirmance is reported in 308 N. Y. 798. With respect to appellant's motion in the New York Court of Appeals for

reargument and amendment of the remittitur, the memorandum decision of that Court, denying reargument but amending the remittitur, is reported in 308 N. Y. 941.

Jurisdiction

The New York Court of Appeals issued its final order on April 21, 1955. The Notice of Appeal was duly served and thereafter filed on July 15, 1955. Probable jurisdiction was noted by order dated November 7, 1955 (R. 22).

The jurisdiction of this Court is invoked under Title 28 U. S. C. Section 1257 (2).

Constitutional and Statutory Provisions

The validity of Article VII-A, Title 3 of the New York Tax Law is involved and it is claimed by Appellant to be repugnant to the due process and equal protection clauses of the Fourteenth Amendment to the United States Constitution, in so far as it is applicable to a ~~known~~ incompetent owner of property. This statute is found in McKinney's Consolidated Laws of New York, Book 59, Part 1, Sections 165 through 165 i, pages 426 through 447. The texts thereof are set forth in Appendix "A".

Questions Presented

1. Whether Article VII-A, Title 3 of the New York Tax Law and its application to a property owner known by the Town of Somers to be incompetent, are

repugnant to the United States Constitution in that the act and its application result in a deprivation of property without due process and deny such known incompetent-property owner equal protection of the laws, all of which is prohibited and invalid under Section 1 of the Fourteenth Amendment to the United States Constitution?

2. Whether the taking by the Town of Somers (a Tax District under such statute) of the property of the known incompetent, Nora Brainard, without provision for and the actual appointment of a competent person to protect her interests, was a deprivation of due process and a denial of equal protection of the laws under the Fourteenth Amendment to the United States Constitution?

3. In a judicial proceeding to foreclose a tax lien without providing for the appointment of a competent person to protect the known incompetent's interests, whether the taking by the Town of her property, the value of which was known by it to be far in excess of the aggregate tax liens thereon, constituted a deprivation of due process and a denial of equal protection of the laws under the Fourteenth Amendment to the United States Constitution?

Statement of the Case

Preface: The Facts Are Undisputed.

Because the Appellee filed no affidavit and because it submitted no proof to put in issue the statement of facts set forth in the original papers presented to the Court below, accordingly, the following facts are deemed to be undisputed.

A. The Circumstances Leading to the Taking of the Incompetent's Property by Appellee:

Nora Brainard, a resident in the Town of Somers in the State of New York, had been and was an incompetent for upwards of fifteen years and during that time was known to and by the officials and citizens of the Town of Somers as a person without mental capacity to handle her affairs and to understand the meaning of any notices served upon her personally, by mail or by publication (R. 5, 8, 9, 10).

Nora Brainard was a person of means and at all times financially able to meet her obligations. She owned four parcels of income-producing improved real property, other than the one involved in the instant proceeding, and so could have complied with tax notices, had she been able to comprehend the nature thereof (R. 5, 10, 11). She appears to have lived alone, she had no relative or next-of-kin within the State. There was no one present or available who was able to act in her behalf, to make payment to the Town for her delinquent taxes, or to clear up the tax lien defaults (R. 5, 11).

Although incompetent in every respect for so many years, no one sought to have any Committee appointed for her person or property until months after the judgment in this proceeding had been entered, when the Northern Westchester Bank, a holder of a mortgage on one of her improved parcels of real property, retained a lawyer to foreclose its mortgage by reason of a default thereunder (R. 9). What became obvious to a stranger after a brief investigation, is the very thing which the officials and citizens of the Town of Somers had

been living with over a period of many years. The private litigant knew it should not and could not go further until some person were appointed to protect the rights of the incompetent. But what had the Town done?

On May 8, 1952, the Town instituted the instant proceeding to foreclose many tax liens, one of which was its lien against the parcel of real property owned by the incompetent. Notice of the commencement of such proceeding was given (a) by mail to the owners including the incompetent, (b) by posting a notice in the Post Office, and (c) by publication in two local newspapers (R. 5, 8). When no party or owner filed any answer and the time fixed as the last day for redemption had expired, the Town attorney applied for and obtained an order appointing a Special Guardian to report and protect the interests of persons having any interest in this proceeding who may be in the military service (R. 9), but no such application was made by him for the appointment of a Special Guardian to protect the rights of a person known by him, the Town and its citizens to be incompetent.

On September 8, 1952, judgment of foreclosure was entered and on October 24, 1952, a deed to the property was delivered to the Town (R. 8). Apparently in recognition of the existence of said incompetency, Nora Brainard formally was certified by the County Court on October 29, 1952, as a person of unsound mind. One week later, on November 6, 1952, she was committed to the Harlem Valley State Hospital (R. 8).

Thereafter on February 13, 1953, appellant was appointed and qualified as Committee of the Person and Property of the incompetent. This was pursu-

ant to an order made on January 30, 1953. Sometime prior to September 22, 1953, the Town offered the incompetent's property for sale with a minimum bid price of $6,500.00. However, the unpaid taxes, interest, penalties, costs of foreclosure, attorneys' fees and maintenance charges on the property accrued to September 22, 1953, aggregated but $480.00. On September 22, 1953, the Committee's attorney appeared before the Town Board and offered to repay the Town all such taxes, interest, penalties, costs of foreclosure, attorneys' fees and cost of maintenance in consideration for the return of the property to the incompetent's estate. This was refused. Thereafter, the Town rescheduled the sale of the property with a minimum bid price of no less than $3,500.00 (R. 11).

B. Events Since the Taking of the Property:

Appellant, as such Committee, then made application to the Westchester County Court, where the judgment of foreclosure had been entered, to vacate the judgment and set aside the deed to the Town, and there urged that the Town had not apprised the Court of Nora Brainard's mental condition and that no one had been appointed to act on her behalf. Appellant also contended that the notice, although in compliance with the statute, was inadequate insofar as a known incompetent was concerned and therefore, the statute under which the Town acted was repugnant to the United States Constitution (R. 6). However, the County Court held that the incompetent was not deprived of her constitutional rights and that the statute is valid (R. 12, 13).

Similarly, these points were urged again in the Appellate Division of the New York Supreme Court and

then in the New York Court of Appeals. In each Court the order was affirmed. On the motion for reargument in the Court of Appeals and for amendment of the remittitur, that Court denied reargument but amended the remittitur to show that upon the appeal "there was presented and necessarily passed upon a question under the Constitution of the United States, viz., whether the taking by the Town of Somers, of the property here involved, was, on this Record, a deprivation of due process and equal protection of the laws under the Fourteenth Amendment. The Court of Appeals held that there was no denial of any Constitutional right of the Petitioner". (308 N. Y. 941). (R. 21, 22).

C. Present Status of the Property:

Pursuant to an order granted by the New York Court of Appeals, the Town of Somers was stayed from proceeding with the sale of the property, and by subsequent stipulation of the parties, this stay has been extended pending the review and determination of the appeal to this Court.

Argument

I

Since the Town of Somers and its officials knew that Nora Brainard was incompetent and unable to understand the nature of the notice, its strict compliance with the statute with respect to notice was but a mere gesture, and resulted in a deprivation of her property without due process.

This statute, insofar as here pertinent, generally provides for the judicial foreclosure of tax liens on real property. Provision for notice is made by (1) publication, (2) posting and (3) mailing. The prescribed notice is to the effect that unless the aggregate amount of taxes, assessments and accrued legal charges are paid within seven weeks, or an answer interposed, the ownership of the realty will pass to the taxing district. If final payment is not made or if no answer is interposed, a final judgment is entered vesting absolute title to the real property in the taxing district and a deed to the property is then delivered to such taxing district. The statute then declares these provisions to be applicable to, valid and effective with respect to all defendant-owners, even though one or more of them be infants or incompetents, and further that all persons including incompetents who may have had any right, title, interest, claim, lien or equity of redemption in such parcel of realty shall be barred and forever foreclosed of all such right, title, interest, claim, lien or equity of redemption.

In effect then, the statute provides for a vesting of title in the taxing district which shall be absolute and beyond dispute. Although a number of harsh and obviously shocking results are reported,[1] we do not contend for, and this case does not involve the invalidity of the taxing statute *per se*. However, we do contend that its precise and particular application to the instant circumstances deprived a known incompetent of her property without due process.

We readily recognize that all persons within the taxing district are subject to taxation, including insane persons, and that it is no excuse for non payment of taxes that an owner of property is insane (2 Cooley on Taxation, 1257, Section 585, and 3 Cooley on Taxation, 2532, Section 1272; Fourth Edition). When, however, the statute provides for a vesting of title in the taxing district which shall be absolute and beyond dispute, this is the equivalent of forfeiture. In 3 Cooley on Taxation, 2673, Section 1350, it is stated:

> "But if by forfeiture is understood the vesting in the state a title which shall be absolute and beyond dispute, the question presented is different. It is impossible that there can be any right to declare a forfeiture, except as a result of an adjudication to which the owner was a party, which has determined that default, upon which

[1] *City of New York* v. *Nelson*, 309 N. Y. 94, where the City for total arrears of $887.00 acquired properties assessed at $52,000.00 and one parcel was resold by it in excess of the assessed valuation.

City of New York v. *Brown*, not officially reported but see "The Search" published by City Title & Insurance Co., Volume 3, No. 4, Nov.-Dec. 1955, where the City for total arrears of $85.20 in water taxes acquired property valued at $8,000.00 and assessed at $10,000.00.

the forfeiture was based, exists in fact, and that the requisite steps which were to precede the forfeiture had actually been taken. In some judicial tribunal the party whose freehold is seized has a right to a hearing on these questions: a constitutional right, if constitutional protections to property are of any avail."

Apparently the Legislature, in enacting this novel legislation providing for forfeiture of property, took cognizance of this principle and provided for the judicial foreclosure proceeding with notice to be given by three separate methods. Although the notice in the instant case was in strict compliance with the statute, it does not satisfy due process requirements insofar as it is applicable to Nora Brainard, a known incompetent.

It has been stated that due process is both a substantive and procedural concept.

> WE THE JUDGES by Justice William O. Douglas at page 263.

In *Mullane* v. *Central Hanover Trust Company*, 339 U. S. 306, this Court stated:

> "Many controversies have raged about the cryptic and abstract words of the Due Process Clause but there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case" (p. 313).
>
> "Against this interest of the State we must balance the individual interest sought to be protected by the Fourteenth Amendment. This is

defined by our holding that 'The fundamental requisite of due process of law is the opportunity to be heard'. *Grannis* v. *Ordean*, 234 U. S. 385, 394. This right to be heard has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest" (p. 314).

"An elementary and fundmental requirement of due process in any proceeding which is to be accorded finality is notice reasonable calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. (Citing cases). The notice must be of such nature as reasonably to convey the required information, *Grannis* v. *Ordean, supra,* and it must afford a reasonable time for those interested to make their appearance, (citing cases). But if with due regard for the practicalities and peculiarities of the case these conditions are reasonably met, the constitutional requirements are satisfied. 'The criterion is not the possibility of conceivable injury but the just and reasonable character of the requirements, having reference to the subject with which the statute deals.' (citing cases).

"But when notice is a person's due, process which is a mere gesture is not due process. The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it. The reasonableness and hence the constitutional validity of any chosen method may be defended on the ground that it is in itself reasonably certain to inform those affected, (citing cases), or where

conditions do not reasonably permit such notice, that the form chosen is not substantially less likely to bring home notice than other of the feasible and customary substitutes" (pp. 314-315).

The Appellee's notice to the incompetent was, in effect, that she would forfeit her property if she failed to pay the aggregate amount of the lien or file an answer within the prescribed statutory period. Here, Appellee knew, when it was giving the pro forma statutory notice to the incompetent, that she was incapable of understanding the nature thereof and incapable of protecting her property and interests therein. Such notice, although in compliance with the statute, was but a mere gesture.

Indeed, the Town with full knowledge that the incompetent's property would be forfeited if it but for a fraction of its true value in unpaid taxes, did not notify the Court of her mental condition. It should have done so.

28 American Jurisprudence, Section 109, page 741.

Had it done so, then the Court would have appointed one who could adequately protect her rights and interest in the proceeding.

44 Corpus Juris Secundum 303, Section 141; *American Mortgage Co.* v. *Dewey,* 106 App. Div. 389, 94 N. Y. S. 808.

Apparently the New York Court of Appeals by its affirmance without opinion has sanctioned the Appellee's failure to have a Special Guardian or other competent person appointed for the receipt of notice and the protection of the known incompetent's inter-

ests. Our research discloses that in every instance wherever any interest, right or claim of a known incompetent may be involved, provision is made either in the statute or by decisional law for the appointment of a suitable and proper person to receive notice and protect such interest, right, claim or title of the known incompetent. The New York decisional law is nothing more than an enunciation of the common law as it had been for many years and as borrowed from the common law of England.

See:

2 CARMODY'S NEW YORK PRACTICE, Section 561 at pages 951 and 952; and

American Mortgage Co. v. *Dewey*, 106 App. Div. 389, 94 N. Y. S. 808,

wherein the Court stated:

> "In the nature of things it was impossible for the Legislature to meet every condition that might arise as affecting the person or property of incompetents, whether judicially declared insane or not; but it does not follow, because we cannot find express provision in the Code of Civil Procedure conferring the power or regulating the mode or manner of exercising it to protect the interests of lunatics and incompetents, that, therefore the Court lacks the power to protect such persons in some adequate manner. It has been repeatedly held that the power exists in the Court, and where there are provisions in the Code of Civil Procedure describing the way in which this power shall be exercised, those provisions must be complied with and followed; but where there is an absence of provisions regu-

lating the exercise of the power, then it becomes the duty of the Court to determine the mode or manner in which the power can be best exercised to effect the end desired. In other words, the power is inherent in the Court and is not conferred by the Code of Civil Procedure, but the latter in many instances merely prescribes when and how it shall be invoked." (at p. 392 of 106 App. Div.)

"Nor do we think that merely receiving the summons is all that the person designated to represent a defendant who has substantial interests in the controversy and who is *non compos mentis*, but who has not been judicially declared insane, is required to do. We think the provisions in the order should be sufficiently broad to enable him to look after the interests of such defendant at every stage of the action. In a foreclosure suit this includes not only the duty of representing the incompetent up to the time of the judgment in foreclosure and sale, but also interests the incompetent may have in the surplus realized after a sale." (at p. 393 of 106 App. Div.)

II

Result of holding that the particular notice as applied to a known incompetent is invalid.

The salutary aims of the statute would not be nullified by a ruling from this Court that insofar as a known incompetent was concerned, the strict compliance with the notice requirements does not constitute

due process. Such a ruling will not render havoc with titles to real property so acquired. This statute may be constitutional in every respect except when its requirements of notice are applied to a known incompetent.

Conclusion

Strict compliance with notice requirements of the taxing statute is incompatible with the due process requirements of the Fourteenth Amendment as a basis for adjudication depriving a known incompetent of substantial property rights. Accordingly, the judgment should be reversed and the cause should be remanded to the State Court for further proceeding.

Dated: February 14, 1956.

Respectfully submitted,

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APPENDIX A

1. Relevant Provisions of the Constitution:

AMENDMENT 14

Section 1. * * *; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

2. Applicable Statute:

TITLE 3: FORECLOSURE OF THE TAX LIEN BY ACTION IN REM

§ 165. FORECLOSURE BY ACTION IN REM

Whenever it shall appear that a tax district owns a tax lien which has been due and unpaid for a period of at least four years from the date on which the tax, assessment or other legal charges represented thereby became a lien, such tax lien, except as otherwise provided by this title, shall be summarily foreclosed by the tax district in the manner provided in this title notwithstanding the provisions of any general, special or local law and notwithstanding any omission to hold a tax sale prior to such foreclosure. Ownership of a transfer of tax lien or of a tax sale certificate or of any other instrument evidencing such tax lien by the tax district issuing the same shall be evidence of the fact that the tax, assessment or other legal charges represented thereby have not been paid to the tax district or assigned by it.

§ 165-a. FILING OF LIST OF DELINQUENT TAXES

1. Within six months after the date of adoption of a resolution electing to adopt title three hereof and annually thereafter, the collecting officer of such tax district shall file in the office of the clerk of the county in which the property subject to such tax liens is situated, a list of all parcels of property, except those excluded from such list as hereinafter provided, affected by unpaid tax liens held and owned by such tax district which on the date of filing shall have been unpaid for a period of at least four years or more after the date when the tax, assessment or other legal charge represented thereby became a lien, provided, however, in a tax district having a population of more than fifty thousand according to the latest federal census all such parcels need not be included in the list first filed after the adoption of such resolution but may be included in more than one list, in which event each such list shall comprise all such parcels within a particular area in such district, except those excluded from such list as hereinafter provided. Such area shall constitute an existing geographical area such as a city, town, village, ward, section or other appropriate area bounded or defined by law. All lists covering all such parcels in all such areas in such district shall be filed within one year from the date of adoption of the resolution of election. Before filing any list of parcels of property in any year, the collecting officer with the approval of the governing body of the tax district may exclude particular parcels therefrom. The collecting officer when requesting approval for the exclusion of any particular parcel shall state the reasons therefor in writing. No parcel shall be excluded from any such list for any reason, other than the following: (1) that a question has been raised by a person having

an interest in such parcel as to the validity of the tax lien affecting such parcel, or (2) that the tax district has agreed to accept payment of delinquent taxes, assessments or other legal charges in installments of at least two years of such arrears with each year of current taxes, assessments or other legal charges and there has been no default in such installments, or (3) that an agreement has been duly made and executed and filed with the tax district for the payment of such delinquent taxes, assesments[1] or other legal charges in installments, the first of which shall be in an amount equal to at least twenty-five per centum of such arrears payable upon the making and filing of the installment agreement, and the balance of which shall be in amounts equal to at least two years of such arrears and payable with each year of current taxes, assessments or other legal charges and there has been no default in such installments, or (4) that within two years last passed the tax district had sold or assigned a tax lien owned and held by the tax district to a person who had not completed all of the proceedings necessary to enforce such tax lien. The collecting officer shall transmit a list of all parcels within the particular area selected which are affected by tax liens which shall have been unpaid for a period of at least four years and an additional list which shall designate which of the parcels on the first list should be excluded. Such list of all parcels and such additional list, if any, shall not be acted upon at the meeting of the governing body at which they appear on the calendar for the first time, nor shall such body approve the exclusion of any parcel at any succeeding meeting unless one week has elapsed after the meeting when

[1] So in original. Probably should read "assessments".

such exclusion was first submitted for approval. The approval of such exclusion by the governing body shall be by resolution recorded in its minutes stating the reason therefor. All parcels included in any list shall be numbered serially. The collecting officer shall file a certified copy of each list in the office of such collecting officer, in the office of the attorney for such tax district and in the office of the collecting officer of any other tax district having a right to assess any of the parcels described upon such list. The inadvertent failure of the collecting officer to include all parcels in such list, or where more than one list is filed all such parcels in the designated area, shall not affect the validity of any proceeding brought pursuant to this title. Each such list shall be known and designated as the "List of Deliquent Taxes" and shall bear the following caption:

"..... court, ... county. In the matter of foreclosure of tax liens pursuant to article seven-a, title three of the tax law by ..... (insert name of tax district.) List of delinquent taxes". Where the list comprises parcels in a particular area the caption shall also generally describe the area covered by the list. Each list shall also contain as to each parcel, the following:

(a) A brief description sufficient to identify each parcel affected by such tax lien. A description by stating the lot, block and section number or other identification numbers of any parcel upon a tax map, or a lot number or other identification number of any tract, the map of which is filed in the county clerk's or register's office, shall be a sufficient description.

(b) The name of the last known owner of such parcel as the same appears on the assessment roll of the

tax district for the year preceding the calendar year in which such list is filed.

(c) A statement of the amount of each tax lien upon such parcel including those which shall have been due and unpaid for less than four years together with the date or dates from which and the rate and rates at which interest and penalties shall be computed.

Such list of delinquent taxes shall be verified by the affidavit of the collecting officer. The filing of such list of delinquent taxes in the office of the clerk of the county in which the property subject to such tax liens is situated shall constitute and have the same force and effect as the filing and recording in said office of an individual and separate notice of pendency of action and as the filing in the county court of such county or, in the city of New York, in the supreme court of such county of an individual and separate complaint by the tax district against the real property therein described, to enforce the payment of the delinquent taxes, assessments or other lawful charges which have accumulated and become liens against such property.

Each county clerk with whom such list of delinquent taxes is filed shall index it in a separate book kept for that purpose to the name of the taxing district filing such list which shall constitute due filing, recording and indexing of such notice in lieu of any other requirement under section one hundred twenty-two of the civil practice act or otherwise. The county clerk shall be entitled to a feet of ten dollars for such receiving, filing and indexing of each such list in lieu of any other fees to which he might otherwise be entitled for such services except in counties having a block and

section system of indexing lis pendens and in such counties the fee for filing shall be as provided by law.

The county court, except in the counties of the city of New York, and in those counties, the supreme court, is hereby given jurisdiction of actions authorized by this title:

2. Every person including a tax district other than the one foreclosing having any right, title or interest in, or lien upon, any parcel described in such list of delinquent taxes may redeem such parcel by paying all of the sums mentioned in such list of delinquent taxes before the expiration of the redemption period mentioned in the notice published pursuant to section one hundred sixty-five-b, or may serve a duly verified answer upon the attorney for the tax district setting forth in detail the nature and amount of his interest and any defense or objections to the foreclosure of the tax lien. The caption of such answer shall contain a reference to the serial number or numbers of the parcels concerned. Such answer must be filed in the office of the county clerk and served on the attorney for the tax district foreclosing within twenty days after the date mentioned in the notice published pursuant to section one hundred sixty-five-b as the last day for redemption. In the event of failure to redeem or answer by any person having the right to redeem or answer such person shall be in default and shall be barred and forever foreclosed of all his right, title and interest in and to the parcels described in such list of delinquent taxes and a judgment in foreclosure may be taken as herein provided. Upon redemption as permitted by this section, the person redeeming shall be entitled to a certificate thereof from the collector of the tax district describing the

property in the same manner as it is described in such list of delinquent taxes. Upon the filing of such certificate with the county clerk, the county clerk shall note the word "redeemed" and the date of such filing opposite the description of said parcel on such list. Such notation shall operate to cancel the notice of pendency of action with respect to such parcel.

§ 165-b. PUBLIC NOTICE OF FORECLOSURE

Upon the filing of such list in the office of the county clerk, the collecting officer forthwith shall cause a notice of foreclosure to be published at least once a week for six successive weeks in two newspapers designated by him and published in the tax district. If there is only one newspaper published in such tax district, the collecting officer shall cause such notice to be published in such newspaper and in addition thereto in one other newspaper published in the county in which such tax district is situated. If no newspaper is published in the tax district, the collecting officer shall cause such notice to be published in two newspapers published in the county in which such tax district is situated and circulating in such tax district. If only one newspaper is published in said county then the collecting officer shall cause such notice to be published in such newspaper and also in a newspaper published in an adjoining county, and if no newspaper is published in such county, he shall cause the same to be published in two newspapers published in an adjoining county. In New York and Bronx counties the newspapers to be designated for the publication of such notice or any other public notice required pursuant to this article shall be the daily law journal designated by the justices of the appellate division of the first judicial department and

another newspaper designated by said justices pursuant to the provisions of subdivisions one and two of section ninety-seven of the judiciary law. Such notice shall be in substantially the following form:

..... court, ... county.

NOTICE OF FORECLOSURE OF TAX LIENS BY .....
..... (here insert name of tax district)
BY ACTION IN REM

Please take notice that on the ..... day of ....., ..., the ..... (insert name of collecting officer) of ..... (insert name of tax district) pursuant to law filed with the clerk of ..... county, a list of parcels of property affected by unpaid tax liens held and owned by said ..... which on such date had been unpaid for a period of at least four years after the date when the tax, assessment or other legal charge represented thereby became a lien. Said list contains as to each such parcel, (a) a brief description of the property affected by such tax lien, (b) the name of the last known owner of such property as the same appears on the assessment roll of said ..... for the last calendar year, or a statement that the owner is unknown if such be the case, (c) a statement of the amount of such tax lien upon such parcel including those which shall have been due for less than four years together with the date or dates from which, and the rate or rates at which, interest and penalties shall be computed.

All persons having or claiming to have an interest in the real property described in such list of delinquent taxes are hereby notified that the filing of such list of delinquent taxes constitutes the commencement by said ..... of an action in the .....

court, ... county to foreclose the tax liens therein described by a foreclosure proceeding in rem and that such list constitutes a notice of pendency of action and a complaint by the said ..... against each piece or parcel of land therein described to enforce the payment of such tax liens. Such action is brought against the real property only and is to foreclose the tax liens described in such list.

No personal judgment shall be entered herein for such taxes, assessments or other legal charges or any part thereof.

This notice is directed to all persons having or claiming to have an interest in the real property described in such list of delinquent taxes and such persons are hereby notified further that a certified copy of such list of delinquent taxes has been filed in the office of the ..... (here insert title of the collecting officer) of said ..... and will remain open for public inspection up to and including the ..... day of ..... (here insert a date at least seven weeks from the date of the first publication of this notice), which date is hereby fixed as the last day for redemption.

And take further notice that any person having or claiming to have an interest in any such parcel and the legal right thereto may on or before said date redeem the same by paying to the said ..... (here insert title of collecting officer) the amount of all such unpaid tax liens thereon and in addition thereto all interest and penalties which are a lien against such real property, computed to and including the date of redemption. In the event that such taxes are paid by a person other than the record owner of such property, the person so paying shall be entitled to have the tax liens affected thereby satisfied of

record or to receive an assignment of such tax liens evidenced by a proper written instrument.

Every person having any right, title or interest in or lien upon any parcel described in such list of delinquent taxes may serve a duly verified answer upon the attorney for the ..... (here insert name of tax district) setting forth in detail the nature and amount of his interest and any defense or objection to the foreclosure. Such answer must be filed in the office of the county clerk and served upon the attorney for the tax district foreclosing within twenty days after the date above mentioned as the last day for redemption. In the event of failure to redeem or answer by any person having the right to redeem or answer, such person shall be forever barred and foreclosed of all his right, title and interest and equity of redemption in and to the parcel described in such list of delinquent taxes and a judgment in foreclosure may be taken by default.

.....

.....

(Name of office of collecting officer)

.....

Attorney for..... (tax district)

Address:

The collecting officer shall on or before the date of the first publication of the notice above set forth cause a copy of such notice to be posted once in the office of the collecting officer, in the county court house of the county in which the property subject to such tax lien is situated and in three other conspicuous places within such tax district and shall cause a copy of such notice to be mailed to the last known address of

each owner of property affected thereby, as the same appears upon the records in the office of the collecting officer, and in the event that the name or address of such owner does not appear in such records, the taxing officer shall so state in an affidavit which shall be filed in the office of the county clerk. The collecting officer shall cause to be inserted with or attached to such notice a statement substantially as follows:

To the party to whom the enclosed notice is addressed:

You are the presumptive owner or lienor of one or more of the parcels mentioned and described in the list referred to in the enclosed notice.

Unless the taxes and assessments and all other legal charges are paid, or an answer interposed, as provided by statute, the ownership of said property will in due course pass to .....,.....

(name of municipality foreclosing)

as provided by the tax law of the state of New York.

Dated,

.....

Collecting officer

§ 165-c. NOTICE TO MORTGAGEE OR LIENOR

At any time after the enactment of this article, any owner of real property in such tax district, any mortgagee thereof, or any person having a lien or claim thereon, or interest therein may file with the collecting officer a notice stating his name, residence and post office address and a description of the parcel in which such person has an interest, which notice shall continue in effect for the purposes of this section for a period of five years, unless earlier cancelled by such person. The collecting officer shall mail to each such person

forthwith after the completion and filing of the list of delinquent taxes as herein provided, a copy of each notice required under this title and affecting such parcel. The failure of the collecting officer to mail such notice as herein provided shall not affect the validity of any proceeding brought pursuant to this title.

§ 165-d. Filing of affidavits

All affidavits of filing, publication, posting, mailing or other acts required by this title shall be made by the person or persons performing such acts and shall be filed in the office of the county clerk of the county in which the property subject to such tax lien is situated and shall together with all other documents required by this title to be filed in the office of such county clerk, constitute and become a part of the judgment roll in such foreclosure action.

§ 165-e. Trial of issues

If a duly verified answer is served upon the attorney for such tax district within the period mentioned in the notice published pursuant to section one hundred sixty-five-b the court shall summarily hear and determine the issues raised by the complaint and answer in the same manner and under the same rules as it hears and determines other actions, except as in this act otherwise provided. Upon such trial, proof that such tax was paid, together with any interest or penalty which may have been due, or that the property was not subject to tax shall constitute a complete defense. Whenever an answer is interposed as herein provided, the defendant shall have an absolute right to the severance of the action as to any parcel or par-

cels of land in which he has an interest, upon written demand therefor filed with or made a part of his answer.

§ 165-f. PREFERENCE OVER OTHER ACTIONS

Any action brought pursuant to this title shall be given preference over all other causes and actions, and no such action shall be referred except to an official referee and the supreme court and county court are hereby given jurisdiction to make such reference.

§ 165-g. PRESUMPTION OF VALIDITY

It shall not be necessary for the tax district to plead or prove the various steps, procedures and notices for the assessment and levy of the taxes, assessments or other lawful charges against the lands set forth in the list of delinquent taxes and all such taxes, assessments or other lawful charges and the lien thereof shall be presumed to be valid. A defendant alleging any jurisdictional defect or invalidity in the tax or in the sale thereof must particularly specify in his answer such jurisdictional defect or invalidity and must affirmatively establish such defense. The provisions of this title shall apply to and be valid and effective with respect to all defendants even though one or more of them be infants, incompetents, absentees or non-residents of the state of New York.

§ 165-h. FINAL JUDGMENT

(1) The court shall have full power to determine and enforce in all respects the priorities, rights, claims and demands of the several parties to said action, as the same shall exist according to law, including the priorities, rights, claims and demands of the defendants as between themselves, and in a proper case to

direct a sale of such lands and the distribution or other disposition of the proceeds of the sale. The court shall further determine upon proof and shall make findings upon such proof whether there has been due compliance by the tax district with the provisions of this title.

(2) Where as to any parcel included in the list described in section one hundred sixty-five-a of this chapter an answer has been interposed by a party other than a tax district and the court shall determine that such party has any right, title, interest, claim, lien or equity of redemption in such parcel, the court shall make a final judgment directing the sale of such parcel.

(3) Where as to any parcel an answer has been interposed by another tax district and the court shall determine that such other tax district has an interest in such parcel and no party (other than a tax district) shall have answered, then and in that event the tax districts having an interest in such parcel may by agreement between themselves provide (a) for a conveyance without sale of any such parcel to one of such tax districts free and clear of any right, title or interest in or lien upon such parcel of such tax districts, or (b) for a conveyance without sale of any such parcel to one of such tax districts subject to any right, title or interest in or lien upon such parcel of such other tax district or districts. In either of such events the court shall in its judgment expressly dispense with the sale and direct the making and execution of a conveyance by the collecting officer in accordance with such agreement. In the absence of such an agreement the court shall make a final judgment directing the sale of such parcel.

(4) Any sale directed by the court shall be at public auction by the collecting officer. Public notice thereof shall be given once a week for at least three successive weeks in a newspaper published in the tax district, if any, or, if none, in a newspaper published in the county in which such tax district is situated. The collecting officer shall receive no fee or compensation for such service. The description of the parcel offered for sale in such notice shall be that contained in the list of delinquent taxes with such other description, if any, as the court may direct.

(5) In directing any conveyance pursuant to this title, the judgment shall direct the collecting officer of the tax district to prepare and execute a deed conveying title to the parcel or parcels concerned. Said title shall be full and complete in the absence of an agreement between tax districts as herein provided that it shall be subject to the tax liens of one or more tax districts. Upon the execution of such deed the grantee shall be seized of an estate in fee simple absolute in such parcel unless expressly made subject to tax liens of a tax district as herein provided, and all persons, including the state of New York, infants, incompetents, absentees and non-residents, except such tax district, who may have had any right, title, interest, claim, lien or equity of redemption in or upon such parcel, shall be barred and forever foreclosed of all such right, title, interest, claim, lien or equity of redemption.

(6) The court shall make a final judgment awarding to such tax district the possession of any parcel described in the list of delinquent taxes not redeemed as provided in this title and as to which no answer

is interposed as provided herein. In addition thereto such judgment shall contain a direction to the collecting officer of the tax district to prepare, execute and cause to be recorded a deed conveying to such tax district full and complete title to such lands. Upon the execution of such deed, the tax district shall be seized of an estate in fee simple absolute in such land and all persons, including the state of New York, infants, incompetents, absentees and non-residents who may have had any right, title, interest, claim, lien or equity of redemption in or upon such lands shall be barred and forever foreclosed of all such right, title, interest, claim, lien or equity of redemption.

7. Every deed given pursuant to the provisions of this section shall be presumptive evidence that the action and all proceedings therein and all proceedings prior thereto from and including the assessment of the lands affected and all notices required by law were regular and in accordance with all provisions of law relating thereto. After two years from the date of the record of such deed, the presumption shall be conclusive, unless at the time that this subdivision takes effect the two-year period since the record of the deed has expired or less than six months of such period of two years remains unexpired, in which case the presumption shall become conclusive six months after this subdivision takes effect. No action to set aside such deed may be maintained unless the action is commenced and a notice of pendency of the action is filed in the office of the proper county clerk prior to the time that the presumption becomes conclusive as aforesaid.

§ 165-i. Withdrawal of parcels from foreclosure.

The collecting officer of any tax district may at any time prior to final judgment withdraw any parcel from a proceeding under this title with the approval by resolution of the governing body stating the reason therefor. No parcel shall be withdrawn from such proceedings except for one of the reasons set forth in subdivision one of section one hundred sixty-five-a as a reason for exclusion of a parcel from a list of delinquent taxes. Upon such withdrawal the tax liens on any parcel so withdrawn shall be and remain the same as if no action had been instituted and the collecting officer shall issue a certificate of withdrawal which shall be filed with the county clerk who shall note the word "withdrawn" and the date of such filing opposite the description of such parcel on the list. Such certificate may include one or more parcels appearing on any list. Such notice shall operate to cancel the notice of pendency of action with respect to any such parcel.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 380

EDWIN B. COVEY, Committee of the Person and Property of NORA BRAINARD, an Incompetent,

Appellant,

—against—

TOWN OF SOMERS,

Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

APPELLANT'S REPLY BRIEF

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APPELLANT'S REPLY BRIEF

In our main brief, we stated that Nora Brainard "had been and was an incompetent for upwards of 15 years and during that time was known to and by the officials and citizens of the Town of Somers as a person without mental capacity to handle her affairs and to understand the meaning of any notices served upon her", and that such facts are undisputed (Appellant's Brief, pp. 3, 4). The Appellee does not now take issue with this, but it does state:—"Actually, she was not officially adjudged incompetent until January 30, 1953, four months after the entry of judgment of foreclosure and three months after the delivery of the deed. The Appellant was subsequently appointed and qualified as Committee of Nora Brainard February 13, 1953." (Appellee's Brief, p. 3). This statement is incorrect. Nora Brainard was adjudicated a person of unsound mind on October 29, 1952, five

days after the delivery of the deed (R. 8). Appellant was appointed her Committee on January 30, 1953 and he qualified as such on February 13, 1953 (R. 7).

Strangely enough, the Attorney General in his brief on behalf of the State of New York as amicus curiae, attempts to create an issue of fact where none exists. On page 17 of his brief, he states that at the time the foreclosure judgment was entered, Nora Brainard had not been declared an incompetent and there is no evidence in the record to support a finding that at that time she was an incompetent. Apparently to support such argument, the Attorney General in his statement of the case omits reference to the salutary portion of the record left undisputed by Appellee, but mentions merely the affidavit of Appellant's attorney. He then terms the statement of incompetency as being solely an "opinion" (Brief of Amicus Curiae, p. 18). The portion of the record (R. 8) of which the Attorney General has failed to take cognizance reads:

> "Upon information and belief, the said Nora Brainard was incompetent, although not adjudicated for many years past and was known to the citizens of the Town of Somers, in which she resided, and to the officials of the Town as a person without mental capacity to handle her affairs and unable to understand the meaning of any notices served personally upon her by mail or by publication."

In the consideration of this case by the Courts below, these facts were tendered and accepted without dispute. Factually, there can be no issue as to Nora Brainard's incompetency and its knowledge by Appel-

lee. Even in the dissenting opinion of the Appellate Division, it was stated:

> "It appears without dispute that the taxpayer was incompetent for many years to the knowledge of the Town officials. Within a few days after the Town took a deed to her property for non-payment of taxes, the taxpayer was adjudicated incompetent and a Committee of her person and property appointed." (R. 16, 17).

The foregoing is set forth so as to put at rest the proffered inference of a possible issue of fact with respect to the incompetency and Appellee's knowledge thereof. Nora Brainard is and was incompetent for 15 years and the officials of the Town of Somers were fully cognizant of it.

* * * *

The legislature has the sole power to establish the methods for levy and collection of taxes. It is one thing to assess, levy and to impress a lien for taxes on property, but it is a wholly different thing to deprive a person of a right of property for failure to pay taxes. The exercise of the taxing power is a severe exercise of the power of absolute sovereignty on behalf of the State. To divest ownership without notice and without compensation for the surplus or excess value is an instance where constitutional government approaches most nearly to an unrestrained tyranny. Redemption is the last chance of a citizen to recover his property. Cooley on Taxation (4th Ed.) Secs. 1562, 1567, 1568.

The protection of the right of redemption is as old as the law itself, being found in the Hebraic,

Roman and Civil Law. *Leviticus XXV*, Lines 23-35; *1 Jones on Mortgages* (8th Ed.) Sec. 8; *4 Pomeroy's Equity Juris* (5th Ed.) Secs. 1799 et seq. Involved in it is a right to surplus funds and when such a right is to be cut off by foreclosure, proper notice is a person's due, and notice which is notice in form but a gesture in fact, is not due process. The notice, purported to have been given to the incompetent, notified her of nothing. It was no notice. She, an incompetent, did not have the same protection of the law with respect to notice equal to that of others. Had proper notice been afforded her, her property rights would have been protected. Accordingly, she was not only deprived of her property by reason of a lack of due process, but also by reason of the lack of equal protection of the laws.

An incompetent person also is incapable of acting to protect his rights from the rapacity of those instituting suits. At common law, the rights of persons non compos mentis were peculiarly under the protection of the King who, from the nature of the organization of the English government, was bound, as parens patriae, to protect their rights as helpless subjects within his Kingly realm. From the multiplicity of his social, political and military duties, not being able to give personal protection to the individual rights of his several insane and helpless subjects, the King delegated that authority to his Chancellor by his Sign Manual—that is, by written power and authority signed by the King in person, and delivered under his privy seal to the Chancellor. The rights of insane persons were at common law to be protected by the Chancellor as the personal representative

of the King, the source of sovereignty and not by the Court of Chancery.

Pomeroy Equity Juris. (3rd Ed.) Sec. 1311

But in this country, the prerogative power of the King is vested in the people of the State, who are represented by the Attorney General. Although, we have expressly stated that the constitutionality of the taxing statute is not involved, we find the Attorney General in the anomalous position of allying himself with Appellee against his ward whom Appellee knew as incompetent and incapable of protecting herself. He seeks to justify his tenuous position by the claim that perhaps she was not incompetent and consequently, even if she were a known incompetent, she deserves to be deprived of her property because her Committee, the Appellant, should have instituted a separate "action" instead of proceeding in this original foreclosure suit by motion for the same relief. Appellee joins the Attorney General in advancing such contention.

Here, too, their position is untenable. They claim that the "Courts of New York have determined that a remedy existed, to wit: an action to set aside the deed and that the procedure adopted by Appellant was improper." (Brief of Amicus Curiae, p. 15, Appellee's Brief, pp. 4, 5). It is then gratuitously stated that Appellant does not dispute this. Both Appellee and the Attorney General are in error.

The provision, contained in Subd. 7 of Sec. 165h of the Tax Law affording a remedy by separate plenary action similar in all respects to a motion in the action, is not exclusive. There is nothing in the

statute to make it so, and there is no prohibition of the motion such as we have presented.

The opinion and decision of the County Court in this case appeared on December 3, 1953. On February 1, 1954, the Appellate Division in *Nelson, et al. v. City of New York*, 283 App. Div. 722, directly disapproved of and rejected the separate or plenary action suggestion. It relegated the taxpayers to a motion in the foreclosure action to open their default and to take such proceedings therein so as to enforce whatever rights and remedies they may have. This was precisely what had been done previously by the Appellant in the case at bar.

It was that same Appellate Court which, on April 12, 1954 passed on the appeal from the County Court in the case at bar. Neither the prevailing or dissenting opinion made mention of the separate action suggestion. It is reasonable to assume that that Court found it unnecessary to do, in view of its memorandum decision in *Nelson, et al. v. City of New York* (*Supra*), published but two and a half months previously.

Parenthetically, the taxpayers in the *Nelson* case then moved in the foreclosure proceeding to open their default, etc. That motion was denied in the lower Courts and affirmed by the New York Court of Appeals in 309 N. Y. 94.

Appellee seeks to distinguish the situation in the *Nelson* case by stating that that case was decided under the Administrative Code of the City of New York and that when the first decision was rendered, the Administrative Code lacked the statutory provisions similar to Subd. 7. Suffice it to say, when the subsequent proceedings were taken, the Administrative

Code was amended to conform in its entirety to the State Tax Law under consideration so as to contain the provisions similar to Subd. 7.

Further illustrating the fallacy and error in the statement and contention that "The Courts of New York have determined" that the separate or plenary action is the exclusive remedy of Appellant are: *Matter of Wolford* (not officially reported) 130 N. Y. S. 2nd 250, (4/30/54), where a motion was made, entertained and granted in the original foreclosure action under the State tax statute; and *City of New York* v. *Stolpensky,* 134 N. Y. L. J. 10, Col. 2 (10/18/55), where similarly a motion was made, entertained and granted in the original foreclosure suit brought under the Administrative Code which contained a provision similar to that of Subd. 7.

Thus, contrary to the statement of the Attorney General and Appellee, we find that the Courts of New York have not decided and are not relegating taxpayers to a separate or plenary action. Research on our part has failed to reveal any case in any Court in New York, wherein the ruling of the County Court as to exclusiveness of remedy was followed.

A judgment rendered without appearance or service of process is a nullity. *15 Corpus Juris,* page 845. The question of jurisdiction is always open (*15 Corpus Juris,* p. 850) and may be inquired into at any time. Courts are bound to take notice of the limits of their own jurisdiction (*15 Corpus Juris,* p. 852). The rights of the incompetent were never properly before the Court for adjudication. The judgment entered herein affecting her rights is subject to direct attack by motion in the action as well as by collateral attack

as provided for in Subd. 7. *Kamp* v. *Kamp*, 59 N. Y. 212.

The Attorney General concludes his brief with the statement: "It is of legitimate concern to the State of New York that the conclusive presumption of Subd. 7 of Section 165h of the Tax Law should not be nullified, and that the validity of tax titles should not be subject to challenge on such speculative and inconclusive averments." It is undisputed that Nora Brainard was incompetent and known by the Appellee to be incompetent. This is not speculative or inconclusive. It is an uncontradicted fact. We prefer to think that it is the legitimate concern of the State of New York that its ward, Nora Brainard, a known incompetent over whom its position is that of parens patriae, should not be deprived of her property without due process and be denied the equal protection of the laws.

Respectfully submitted,

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No. 380

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

EDWIN B. COVEY, Committee of the Person and Property of NORA BRAINARD, an Incompetent,

Appellant,

—against—

TOWN OF SOMERS,

Appellee,

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

MOTION TO DISMISS

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INDEX

TABLE OF CASES CITED

OTHER AUTHORITIES CITED

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MOTION TO DISMISS

Appellee moves to dismiss the appeal on the ground (a) that the appeal does not present a substantial federal question, (b) that the alleged federal question sought to be reviewed was not properly raised below, and (c) that the judgment rests on an adequate non-federal basis.

Statement of the Case

This proceeding was originally instituted on May 8, 1952, pursuant to Title 3 of Article 7-A of the Tax Law of the State of New York, entitled "Foreclosure of Tax Lien by Action in Rem," for tax arrears accruing more than four years prior thereto.

On that date, publication was begun of a notice of foreclosure, in the Westchester Post and The Record, publications serving the Town of Somers, the appellee herein.

On September 8, 1952, judgment of foreclosure was entered herein; and on or about October 24, 1952, a deed to the property owned by Nora Brainard was delivered to the Town of Somers, and duly recorded in the Office of the Clerk of the County of Westchester, Division of Land Records.

It was not until after the *in rem* proceeding had been concluded that Nora Brainard was admitted to the Harlem Valley Hospital, November 6, 1952, as a person of unsound mind, by an order of the County Court, County of Westchester, dated October 29, 1952.

The appellant was appointed Committee of Nora Brainard on January 30, 1953, by an order of the County Court of the County of Westchester.

The instant motion was made in October, 1953.

Argument on Motion to Dismiss

(a) The appeal does not present a substantial federal question.

The constitutionality of this very statute was presented to this Court in two prior actions and certiorari denied in each case.

City of New Rochelle v. *Echo Bay Waterfront Corp.*, 268 A. D. 182, 49 N. Y. S. 2d 673, aff'd 294 N. Y. 678, cert. den. 326 U. S. 720;

Lynbrook Gardens v. *Ullman*, 291 N. Y. 472, cert. den. 322 U. S. 742.

If the test of constitutionality suggested by appellant is correct, namely, that the right of the Town of Somers to collect tax arrears by *in rem* proceedings is dependent on proof that the Town did not know of the taxpayer's incompetency, it would mean that real estate titles would be in a chaotic state for years.

In this case, the tax became a lien on the property in April 1948. The *in rem* action was instituted more than four years later, May 8, 1952. Judgment of foreclosure was entered September 8, 1952, and the deed to the property delivered to the Town October 24, 1952. It was not until November 6, 1952, that Nora Brainard was admitted to the Harlem Valley Hospital. It was not until January 30, 1953, that the appellant was appointed Committee of the incompetent. When she was judicially declared an incompetent does not appear from the record; but, presumably, it was sometime between November 6, 1952 and January 30, 1953, years after the lien had first attached to the property and sometime subsequent to the delivery of the deed to the Town.

Actually, there is no evidence in the record that the Town officials had knowledge of the incompetency at the time the action was instituted or even when the deed was delivered to the Town on October 24, 1952. The attorney for the Committee made an affidavit on October 21, 1953, a year later, that "from conversations had with the duly elected officials" (names not given) "of the Town of Somers, I am of the opinion that the said Nora Brainard was and has been an incompetent for more than 15 years" (fols. 19-20). This is not tantamount to saying that the Town officials had this knowledge for fifteen years, or when the proceeding was instituted in May 1952, or when

judgment was entered on September 8, 1952 or when the deed was delivered October 24, 1952. In fact, it is no evidence at all of incompetency, which is a matter for determination by a competent physician and not the responsibility of tax collection officials of a municipality. Further, it is significant that when an attempt was made to commit Nora Brainard to a mental institution two years previous, it was unsuccessful (fol. 20).

In any event, it is well settled that unless especially favored by statute, persons under disabilities have no longer time than other persons within which to redeem their lands from tax sale.

85 Corpus Juris, Secundum, Sec. 582c.

The "same strict rules" which apply to the ordinary taxpayer in the case of redemption, also apply to infants and other persons under disability.

Cooley's Law of Taxation, 4th Ed., Vol. 4, Sec. 1563, p. 3071.

The right of redemption is exclusively statutory and can only be claimed in the cases and circumstances prescribed in the statute. Courts cannot extend the time or make any exceptions not made by statute. Redemption cannot be had in equity, except as it may be permitted by statute, and then only under such conditions as the statute may attach.

Keely v. *Sanders*, 99 U. S. 441, 445, 446;
Bank of the State of Alabama v. *Dalton*, 9 How. 522;
Levy v. *Newman*, 130 N. Y. 11, 13, 14;
Johnson v. *Smith*, 297 N. Y. 165, 171.

Tax foreclosures are *in rem* and not against the person of the owner of the property.

Ontario Land Co. v. *Yordy*, 212 U. S. 152, 158.

It is the land that stands accountable to the demands of the state, and the owners are charged with the laws affecting it and the manner by which those demands may be enforced. A statute providing for constructive service does not violate the due process clause of the United States Constitution or deny such owners the equal protection of the laws.

Ballard v. *Hunter*, 204 U. S. 241, 254, 255.

The process of taxation does not require the same kind of notice as is required in an action at law, or even in proceedings for the taking of private property under the power of eminent domain. These are proceedings which have regard to the land itself, rather than to the owners of the land. Constructive notice is good as against the world.

Leigh v. *Green*, 193 U. S. 79, 89, 90, 91.

The payment of taxes must necessarily be enforced by summary and stringent means, and to do this successfully other instrumentalities and modes of procedure are necessary than those which belong to the courts.

State Railroad Tax Cases, 92 U. S. 575, 614;
Murray's Lessee v. *Hoboken Land & Improvement Co.*, 18 How. 272, 281, 282.

The proceedings by which taxes for governmental purposes have been assessed, levied and collected from the citizen have always been regarded as administrative and

not judicial in their character. Such proceedings have from necessity been exercised by governments, by summary methods and procedure. These methods were in exercise and existence long before the adoption of the Constitution and have never been supposed to be affected thereby.

McMahon v. *Palmer*, 102 N. Y. 176, 189, aff'd 133 U. S. 660.

If a judicial agency is used for some part of the process of collection of taxes, it is not because required, but convenient. It is entirely a matter for legislative determination. The tax collecting function is still administrative and remains such even though judicial forms are applied in the process.

Phillips v. *Commission*, 283 U. S. 589; *Protestant Episcopal School* v. *Davis*, 31 N. Y. 574.

(b) The record before the Court of Appeals did not properly raise a federal question.

Mere reference to unconstitutionality without specifying the Federal Constitution has been held to be referable to the State Constitution.

Bowe v. *Scott*, 233 U. S. 658, 664, 665

The Constitution of the State of New York contains due process and equal protection of laws clauses (*New York Constitution*, Article 1, Sections 6 and 11).

Even though there had been a general reference to the Federal Constitution, it would have been insufficient to confer jurisdiction upon this Court.

Herndon v. *Georgia*, 295 U. S. 441, 442, 443.

(c) The judgment rests upon an adequate non-federal basis.

The opinion of the County Court, rendered in December 1953, gave notice to the incompetent's committee, the appellant, that the procedure adopted by the committee was improper, in that Section 165-h, subd. 7, of the Tax Law of the State of New York required the institution of an action to set aside the deed and the filing of a notice of pendency of such action (fol. 51). The Committee had improperly proceeded by motion in the *in rem* action instead of proceeding by action and *lis pendens* as required by the Statute.

The Committee had two years from the delivery of the deed and until October 24, 1954 to institute the appropriate action (Tax Law, Section 165-h, subd. 7, printed at page 37 of the Jurisdictional Statement). When apprised of the proper procedure by the opinion of the County Court in December 1953 the Committee still had more than ten months to comply. Nevertheless, the Committee failed and refused to comply with the statute.

The judgment rests upon an adequate non-federal basis since the incompetent's committee cannot now be heard to complain, in view of his own failure to comply with the statutory provision, even after it had been directly called to his attention. Under the circumstances, there could be no lack of due process or violation of the equal protection of laws clause of the Federal Constitution.

For the foregoing reasons the appeal should be dismissed.

Respectfully submitted,

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Supreme Court of the United States

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BRIEF OF APPELLEE

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INDEX

TABLE OF CASES CITED

OTHER AUTHORITIES CITED

Supreme Court of the United States

OCTOBER TERM, 1955

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ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF OF APPELLEE

Questions Presented

1. Has there been a lack of due process and a denial of equal protection of the laws? Did not the very statute in question afford appellant an adequate remedy, which was not barred by the statute until months after his appointment as committee and the facts as well as the appropriate statutory remedy had been made known to him?

2. In any event and whether or not there was knowledge of the alleged incompetency, by one or more undesignated Town officials, may an *in rem* tax proceeding be successfully attacked under the facts of this case?

Statement of the Case

The *in rem* foreclosure proceeding was originally commenced on May 8, 1952, pursuant to Title 3 of Article 7-A of the Tax Law of the State of New York, "Foreclosure of Tax Lien by Action in Rem."

The proceeding involved the foreclosure of liens for tax arrears accruing in 1948 with respect to a number of properties, including the property which is the subject of this appeal. Under Section 165-a of the Tax Law, inclusion of all properties four years in tax arrears is mandatory and no parcel may be withdrawn except for one of the reasons specified in Section 165-a, subd. 2 (*Tax Law*, Section 165-i). The instant case does not come within any of the exceptions.

Simultaneously with the institution of the proceeding in May 1952, publication was commenced by notice of foreclosure in the Westchester Post and The Record, newspapers serving an area including the Town of Somers, within which the property in question is situated. In addition, notice of commencement of the proceeding was given to Nora Brainard by mail and by posting. All of this was in accordance with the requirements of the statute in question.

It is conceded in the appellant's brief, at page 5, that "notice in the instant case was in strict compliance with the statute."

Four months after the commencement of the proceeding, and on September 8, 1952, judgment of foreclosure was entered herein, not only as to this owner but as to the other owners who had failed to redeem their properties within the time permitted by the statute.

On October 24, 1952, a deed to the property owned by Nora Brainard was delivered to the Town of Somers and

duly recorded in the office of the Clerk of the County of Westchester, Division of Land Records. The same thing occurred in the case of other unredeemed properties.

It was not until after the foreclosure proceeding had been concluded by the entry of judgment and the deed to the property involved delivered to the Town that Nora Brainard was first committed as an incompetent. The commitment occurred nearly six months after the *in rem* proceeding had been initiated, almost two months after judgment of foreclosure had been entered and several days after the deed had been delivered. Actually, she was not officially adjudged incompetent until January 30, 1953, four months after the entry of judgment of foreclosure and three months after the delivery of the deed. The appellant was subsequently appointed and qualified as committee of Nora Brainard on February 13, 1953.

By motion returnable October 26, 1953, at a Special Term of the County Court, County of Westchester, the committee sought to open the default of Nora Brainard, vacate the judgment of foreclosure, and set aside the deed to the Town of Somers.

On December 3, 1953, the County Court denied the motion, and rendered an opinion upholding the constitutionality of the statute in question. In this opinion, the County Court also referred to the fact that the procedure adopted by the committee for Nora Brainard was contrary to statute, citing Section 165-h, subd. 7, of the Tax Law. This section of the statute provides, in substance, that no deed executed and delivered pursuant to a judgment of foreclosure *in rem* shall be set aside unless a separate action is commenced and a notice of pendency of the action is filed in the office of the proper county clerk prior to the

expiration of two years from the date of recording the deed (Tax Law, Sec. 165-h, subd. 7).

Although the committee's time within which to institute an action to set aside the deed, as prescribed by the statute, was not to expire until October 24, 1954—or more than 10 months after the County Court's decision—nevertheless, the committee failed to institute such an action. Instead, he took successive appeals to the Appellate Division of the Supreme Court and to the Court of Appeals of the State of New York. Upon both appeals, the denial of the committee's motion to open the default was upheld.

Argument

I

THE COMMITTEE MAY NOT BE HEARD TO COMPLAIN ABOUT AN ALLEGED FORFEITURE, A LACK OF DUE PROCESS OR A DENIAL OF EQUAL PROTECTION OF THE LAWS. THE SUBJECT STATUTE AFFORDED TO HIM A REMEDY, OF WHICH HE FAILED AND REFUSED TO AVAIL HIMSELF, EVEN AFTER HIS ATTENTION HAD BEEN DIRECTED TO THE FACTS AND APPROPRIATE STATUTORY REMEDY.

The opinion of the County Court, rendered in December 1953, gave notice to the incompetent's committee, the appellant, that the procedure adopted by the committee was improper, in that Section 165-h, subd. 7, of the Tax Law of the State of New York required the institution of a separate action to set aside the deed and the filing of a notice of pendency of such action (R. 12-13). The committee had improperly proceeded by motion in the *in rem* action instead of by separate action and filing a *lis pendens*, as required by the Statute.

The committee had two years from the delivery of the deed, or until October 24, 1954, to institute the appropriate action (Tax Law, Section 165-h, subd. 7, printed at page 32 of appellant's brief). When apprised of the proper procedure by the opinion of the County Court in December 1953, the committee still had more than ten months to comply. Nevertheless, the committee failed and refused to comply with the statute.

The incompetent's committee may not now be heard to complain of lack of due process and denial of equal protection, in view of his own failure to comply with the statutory provision, even after it had been directly called to his attention by the County Court.

Moreover, under these circumstances, the committee cannot very well urge that there has been a forfeiture. The vesting of title was not "absolute and beyond dispute"—as appellant contends at page 9 of this brief—until long after the committee had been appointed, had knowledge of all of the facts and had his attention directed to the proper statutory procedure.

Appellant in his reply to the previous motion to dismiss herein, cited the case of *Nelson* v. *City of New York*, 283 A. D. 722, 127 N. Y. S. (2d) 854, in support of his contention that the procedure by motion—instead of by separate action and *lis pendens*, as provided in *Tax Law*, Sec. 165-h, subd. 7—was proper. That case is not in point for it involved an *in rem* proceeding under the *Administrative Code of the City of New York*. When that decision was rendered, there was no statutory provision in any way similar to Tax Law, Sec. 165-h, subd. 7, applicable to the City of New York.

In the instant case, there has been no lack of due process or denial of equal protection of the laws.

II.

REGARDLESS OF THE KNOWLEDGE OR LACK OF KNOWLEDGE, ON THE PART OF ONE OR MORE OF THE TOWN'S OFFICIALS, OF THE ALLEGED INCOMPETENCY, AT THE TIME OF OR PRIOR TO THE DELIVERY OF THE DEED OR INSTITUTION OF THE *IN REM* PROCEEDING, THE JUDGMENT OF FORECLOSURE AND THE DEED MAY NOT BE SUCCESSFULLY ATTACKED.

The case of *Levy* v. *Newman*, 130 N. Y. 11, involved infants who were not represented by a guardian. There, the Court of Appeals said, at pages 12, 13 and 14:

> "The adults and infants were personally served with notice of the sale, but failed to redeem within the time prescribed by statute. Neither of the infants had a general guardian, and the defendant insists that their right of redemption has not been cut off."
>
> * * *
>
> "The right to redeem lands sold to enforce the collection of taxes assessed against it, is purely statutory, and statutes providing the procedure for assessing and collecting taxes for the sale of land for their non-payment, and for the redemption of lands sold are applicable to infants and persons under disabilities, unless they are excepted from their operation. (*Metz* v. *Hipps*, 96 Penn. St. 15; *Smith* v. *Macon*, 20 Ark. 17; 2 Black Tax Titles (5th ed.) § 713; Cooley Tax. (2d ed.) 533, 534; Burroughs Tax. 362; Ang. Lim. (6th ed.) § 184.)
>
> "It is a general rule that statutes limiting the time in which, and prescribing the procedure by which, rights shall be enforced, are applicable to persons under disabilities, unless expressly excepted. (*Bucklin* v. *Ford*, 5 Barb. 393; *Bank of the State of Alabama* v. *Dalton*, 9 How. (U. S.) 522; *The Sam*

Slick, 2 Curtis C. C. 480; *U. S.* v. *Maillard*, 4 Ben. 459; *Howell* v. *Hair*, 15 Ala. 194; Ang. Lim. (6th ed.) § 194.)"

Following that holding the Court of Appeals of the State of New York, in the case of *Johnson* v. *Smith*, 297 N. Y. 165, held, at page 171:

"Once a default occurs—and the other statutory conditions are met—the county treasurer must obey the law's mandate and sell the property no matter by whom owned—whether by incompetent, infant or trustee or receiver. See, e.g., *Levy* v. *Newman*, 130 N. Y. 11, 28 N. E. 660; *County of Nassau* v. *Day*, 266 App. Div. 738, 41 N. Y. S. 2d 155, affirmed 291 N. Y. 732, 52 N. E. 2d 956; *Bonded Municipal Corp.* v. *Carodix Corp.*, 266 App. Div. 737, 41 N. Y. S. 2d 454, affirmed 291 N. Y. 733, 52 N. E. 2d 956."

If the law were otherwise, each tax collecting official would become the arbiter of the competency or incompetency of each taxpayer whose name or property might appear on a tax delinquency list. At the peril of the possible future invalidation of title to real property, the public official would have to determine when eccentricity crossed the borderline into insanity or incompetency and required the appointment of a guardian for the taxpayer—although even medical experts have been known to differ on such a question. If such an unwarranted and unreasonable burden should be placed upon public officials, it is readily apparent that chaos and uncertainty would result in those cases where title to real property was derived through *in rem* tax proceedings.

The Tax Law does not except incompetents from its provisions but, to the contrary, expressly provides that they

shall be barred and forever foreclosed, in the following language (Tax Law, Section 165-h, subd. 6):

> "Upon the execution of such deed, the tax district shall be seized of an estate in fee simple absolute in such land and all persons, including the State of New York, infants, incompetents, absentees and non-residents who may have had any rights, title, interest, claim, lien or equity of redemption in or upon such lands shall be barred and forever foreclosed of all such right, title, interest, claim, lien or equity of redemption."

The "same strict rules" which apply to the ordinary taxpayer in the case of redemption, also apply to infants and other persons under disability.

Cooley's Law of Taxation, 4th Ed. Vol. 4 Sec. 1563, p. 3071.

Tax foreclosures are *in rem* and not against the person of the owner of the property.

Ontario Land Co. v. *Yordy*, 212 U. S. 152, 158.

The process of taxing real estate does not require the same kind of notice as is required in an action at law, or even in proceedings for the taking of private property under the power of eminent domain. These are proceedings which have regard to the land itself, rather than to the owners of the land. Constructive notice is good as against the world.

Leigh v. *Green*, 193 U. S. 79, 89, 90, 91.

It is the land that stands accountable to the demands of the state, and the owners are charged with the laws affecting

it and the manner by which those demands may be enforced. A statute providing for constructive service does not violate the due process clause of the United States Constitution or deny such owners the equal protection of the laws.

Ballard v. *Hunter*, 204 U. S. 241, 254, 255.

The right of redemption is exclusively statutory and can only be claimed in the cases and circumstances prescribed in the statute. Courts cannot extend the time or make any exceptions not made by statute. Redemption cannot be had in equity, except as it may be permitted by statute, and then only under such conditions as the statute may attach.

Keely v. *Sanders*, 99 U. S. 441, 445, 446;
Bank of the State of Alabama v. *Dalton*, 9 How. 522;
Levy v. *Newman*, 130 N. Y. 11, 13, 14;
Johnson v. *Smith*, 297 N. Y. 165, 171.

The payment of taxes must necessarily be enforced by summary and stringent means, and to do this successfully other instrumentalities and modes of procedure are necessary than those which belong to the courts.

State Railroad Tax Cases, 92 U. S. 575, 614;
Murray's Lessee v. *Hoboken Land & Improvement Co.* 18 How. 272, 281, 282.

The proceedings by which taxes for governmental purposes have been assessed, levied and collected from the citizen have always been regarded as administrative and not judicial in their character. Such proceedings have from necessity been exercised by governments, by summary methods and procedure. These methods were in exercise

and existence long before the adoption of the Constitution and have never been supposed to be affected thereby.

McMahon v. *Palmer*, 102 N. Y. 176, 189, aff'd 133 U. S. 660

If a judicial agency is used for some part of the process of collection of taxes, it is not because required, but convenient. It is entirely a matter for legislative determination. The tax collecting function is still administrative and remains such even though judicial forms are applied in the process.

Phillips v. *Commission*, 283 U. S. 589; *Protestant Episcopal School* v. *Davis*, 31 N. Y. 574.

In his brief, appellant quotes extensively from *Mullane* v. *Central Hanover Trust Company*, 339 U. S. 306. That case did not involve a tax statute and has no bearing whatever on the question presented in this case.

The constitutionality of the very statute attacked in this appeal was presented to this Court in two prior actions and certiorari was denied in each case.

City of New Rochelle v. *Echo Bay Waterfront Corp.*, 268 A. D. 182, 49 N. Y. S. 2d 673, aff'd 294 N. Y. 678, cert. den. 326 U. S. 720;

Lynbrook Gardens v. *Ullman*, 291 N. Y. 472, cert. den. 322 U. S. 742.

IN CONCLUSION

There has been no lack of due process or denial of equal protection of the laws and, therefore, the judgment appealed from should be in all respects affirmed.

Dated, February 29, 1956

Respectfully submitted,

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HARRY H. CHAMBERS
Of Counsel

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 380

EDWIN B. COVEY, Committee of the Person and Property of NORA BRAINARD, an Incompetent,

Appellant,

against

TOWN OF SOMERS,

Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF FOR THE STATE OF NEW YORK AS *AMICUS CURIAE*

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TABLE OF CONTENTS

Table of Cases.

Statutes.

III.

MISCELLANEOUS.

IN THE

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BRIEF FOR THE STATE OF NEW YORK AS *AMICUS CURIAE*

Jurisdiction

This appeal was taken under 28 U. S. C., § 1257(2) from a final order of the Court of Appeals of the State of New York, entered on February 28, 1955, and amended April 21, 1955 (R. 19, 21), unanimously affirming an order of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, entered on April 12, 1954 (R. 15), and answering in the affirmative the question certified by that Court—"Was the order of

this Court entered April 12, 1954 properly made as a matter of law?" The order of the Appellate Division, with one justice dissenting, affirmed an order of the County Court of Westchester County entered on December 16, 1953 (R. 2) denying a motion by appellant as committee of an incompetent (1) to open a default in a foreclosure of a tax lien action *in rem* brought pursuant to Article VII-A, Title 3, of the New York Tax Law, (2) to vacate the judgment of foreclosure entered therein, and (3) to set aside the deed delivered pursuant to the judgment.

Probable jurisdiction of the appeal to this Court was noted by order dated November 7, 1955 (R. 22).

This brief is submitted by the State of New York as *amicus curiae* in accordance with the provisions of Rule 42(4) of the rules of this Court in order to set forth the views of the State of New York as to the validity, under the Constitution of the United States, of Section 165 *et seq.* of Article VII-A, Title 3, of the New York Tax Law as applied to appellant's incompetent.

Opinions of the New York Courts

No opinion was rendered by the Court of Appeals, but a memorandum of affirmance prepared by the State Reporter is reported in 308 N. Y. 798. The Court of Appeals denied a motion by appellant for reargument but granted a motion for amendment of its remittitur stating that:

> "Upon the appeal herein there was presented and necessarily passed upon a question under the Constitution of the United States, viz., Whether the taking by the Town of Somers, of the property here involved, was, on this record, a deprivation of due process and equal protection of the laws under the Fourteenth Amendment. The Court of Appeals held that there was no denial of any constitutional right of the peti-

tioner (See Matter of Town of Somers v. Covey, 308 N. Y. 798)." (R., 21-22).

This memorandum decision is reported in 308 N. Y. 941. The majority and dissenting opinions of the Appellate Division (R. 16-17) are reported in 283 App. Div. 883. The opinion of the County Court of Westchester County (R. 12-13) was not reported.

Question Presented

Has the appellant's incompetent been deprived of her property without due process of law by the application, prior to any determination of her incompetency, of the New York Tax statute providing for foreclosure of tax liens by actions *in rem*, on notice by publication, posting and mailing of opportunity to redeem, and providing a remedy by action to question the regularity of the proceedings when appellant, although judicially advised of the proper remedy, neglected to pursue it notwithstanding that he had ample time to do so?

Article VII-A, Title 3 of the New York Tax Law

The text of Title 3 of Article VII-A of the New York Tax Law, at the time the proceedings were had herein, is set forth in Appendix A of the brief for appellant. The provisions thereof are entitled "Foreclosure of Tax Lien by Action *in Rem*" and, to the extent relevant, are in substance:

> When a tax district owns a tax lien due and unpaid for a period of at least four years, such tax lien shall be summarily foreclosed by the district (§ 165);
>
> Such tax district shall file in the office of the clerk of the county a list of all parcels of property affected by such unpaid tax liens;

No parcel shall be excluded from such list except for certain specified reasons (not here pertinent);

The collecting officer shall file a duplicate of each list in the office of such collecting officer, in the office of the attorney for such tax district and each such list shall be designated as "List of Delinquent Taxes";

Each list shall contain a brief description of each parcel, the name of the last known owner, the statement of the amount of each tax lien and shall be verified by affidavit of the collecting officer:

"The filing of such list of delinquent taxes in the office of the clerk of the county in which the property subject to such tax liens is situated shall constitute and have the same force and effect as the filing and recording in said office of an individual and separate notice of pendency of action and as the filing in the county court of such county * * * of an individual and separate complaint by the tax district against the real property therein described, to enforce the payment of the delinquent taxes, assessments or other lawful charges which have accumulated and become liens against such property." (§ 165-a, 1);

Every person having any right, title or interest in any parcel described in such list may redeem such parcel by paying all the sums mentioned in such list before the expiration of the redemption period mentioned in the notice pursuant to § 165-b, or may serve a duly verified answer upon the attorney for the tax district setting forth any defense or objection for the foreclosure of the tax lien;

Such answer must be filed in the office of the county clerk and served in the office of the attorney for the tax district foreclosing within twenty days after the date mentioned in the notice published pursuant to § 165-b as the last day for redemption;

"In the event of failure to redeem or answer by any person having the right to redeem or answer such person shall be in default and shall be barred and forever foreclosed of all his right, title and interest in and to the parcels described in such list of delinquent taxes and a judgment in foreclosure may be taken as herein provided." (§ 165-a, 2);

Upon the filing of such list in the office of the county clerk the collecting officer forthwith shall cause a notice of foreclosure to be published at least once a week for six successive weeks in two newspapers designated by him and published in the tax district. Such notice shall be entitled "NOTICE OF FORECLOSURE OF TAX LIENS BY BY ACTION *IN REM*", and shall state, among other things, "No personal judgment shall be entered herein for such taxes, assessments or other legal charges or any part thereof", and the day, at least seven weeks from the date of the first publication of the notice, thereby fixed as the last day for redemption;

The collecting officer shall cause a copy of such notice to be posted in certain places and shall cause a copy of such notice to be mailed to the last known address of each owner of property affected thereby (§ 165-b);

"The provisions of this title shall apply to and be valid and effective with respect to all defendants even though one or more of them be infants, incompetents, absentees or non-residents of the State of New York." (§ 165-g);

The court shall make a final judgment awarding to such tax district the possession of any parcel not redeemed and as to which no answer is interposed, and shall direct the collecting officer to prepare and execute

a deed conveying to such tax district full and complete title to such lands. "Upon the execution of such deed, the tax district shall be seized of an estate in fee simple absolute in such land and all persons, including the State of New York, infants, incompetents, absentees and non-residents who may have had any right, title, interest, claim, lien or equity of redemption in or upon such lands shall be barred and forever foreclosed of all such right, title, interest, claim, lien or equity of redemption." (§ 165-h, 6);

Every such deed given "shall be presumptive evidence that the action and all proceedings therein * * * and all notices required by law were regular and in accordance with all provisions of law relating thereto. After two years from the date of the record of such deed, the presumption shall be conclusive, * * * No action to set aside such deed may be maintained unless the action is commenced and a notice of pendency of the action is filed in the office of the proper county clerk prior to the time that the presumption becomes conclusive, as aforesaid." (§ 165-h, 7).

Statement

The facts set forth in the record made in the County Court of Westchester County, which record consists solely of (1) the order to show cause by which this motion was brought on, (2) an affidavit of appellant and (3) an affidavit of his attorney, are most enlightening when stated chronologically.

April 29, 1932—A "List of Delinquent Taxes" for the Town of Somers was filed with the County Clerk of the County of Westchester.

A certified copy of said list was filed in the office of the Town Attorney.

A certified copy of said list was also filed with the Receiver of Taxes of the Town of Somers (R. 9).

April 30, 1952—The Receiver of Taxes of the Town of Somers posted notices designated "Notice of Foreclosure of Tax Liens by the Town of Somers by Action *in rem*" in several post offices located in the town.

The Receiver also mailed a notice, together with a statement addressed "To the party to whom the enclosed notice is addressed" to each person named in the "List of Delinquent Taxes", to the last known address of such person.

"Upon information and belief" one of the persons to whom such notice was mailed was Nora Brainard (R. 8).

May 8, 1952—This *in rem* action, the judgment in which was sought hereby to be vacated by motion, was commenced by the Town of Somers by the publication of a "Notice of Foreclosure of Tax Liens" in two local newspapers serving the town (R. 8).

July 22, 1952—The Receiver of Taxes of the Town of Somers filed an affidavit in this action with respect to the filing of the verified list of delinquent taxes with the County Clerk; the designation of the aforesaid newspapers for publication and the publication therein of such notice, the posting of the aforesaid notices, and the mailing of a notice to each person named in the "List of Delinquent Taxes" (R. 8).

July 23, 1952—The Town Attorney filed an affidavit in this action with respect to the filing of the aforesaid "List of Delinquent Taxes" with the County Clerk; the filing of a certified copy of said list in his office, the filing of a certified copy of such list with the Re-

ceiver of Taxes of the Town of Somers, the posting of the aforesaid notices, the publications of notice and mailing of notices.

The affidavit stated in part:

"'That more than twenty days have expired since the date fixed as the last date for the redemption in said notice of foreclosure, and no party or owner has filed an answer to this action',

* * *

"'The time of each and every person to appear or answer has now expired and all of the parties are now in default for want of pleading.'" (R. 9)

July 24, 1952—Appellant, "not knowing" Nora Brainard, was appointed special guardian of the interests of persons affected by the action who were in military service (R. 9).

September 8, 1952—Judgment of foreclosure was entered against certain property of Nora Brainard upon her default and upon the consent of appellant as special guardian of the interests of persons in military service, said consent having been given after an investigation by him disclosed that not one of the persons named in the tax delinquent list was in military service (R. 5, 8, 9).

October 24, 1952—A deed to the aforementioned property of Nora Brainard was delivered to the Town of Somers and duly recorded (R. 5).

Under the aforecited provisions of subdivision 7 of section 165-h of the New York Tax Law this deed then became "presumptive evidence that the action and all proceedings therein and all proceedings prior thereto from and including the assessment of the lands affected and all notices required by law were regular and in

accordance with all provisions of law relating thereto".

October 29, 1952—Five days after the delivery of the deed Nora Brainard was adjudicated a person of unsound mind (R. 8).

November 6, 1952—Nora Brainard was admitted to the Harlem Valley Hospital (R. 8).

January 30, 1953—Appellant was appointed committee of the person and property of Nora Brainard, an incompetent, by order of the judge of the County Court of the County of Westchester (R. 7).

September 15, 1953—The attorney for appellant appeared before the Town Board and offered to the town officials the tax arrears, interests, penalties, foreclosure costs and the costs of maintenance, adding to approximately $480, on behalf of the incompetent and her committee in consideration for the return of the deed to the aforesaid property, but this offer was refused (R. 6-7, 11).

October 21, 1953—The attorney for appellant verified an affidavit wherein he said in part:

> "From investigation made by me and from conversations had with the duly elected officials of the Town of Somers, I am of the opinion that the said Nora Brainard was and has been an incompetent for more than 15 years. I have been advised that more than 2 years ago efforts were made by one of the Justices of the Peace of the Town of Somers to have her committed to Grasslands Hospital, a State Hospital for Mental Defectives, by reason of her mental condition. I have been further advised that on many occasions the State Police were called to abate the nuisances committed by the said Nora Brainard. That she had no living relatives in this State." (R. 5)

Appellant verified an affidavit wherein he said, in part, that subsequent to the entry of the judgment of foreclosure on September 8, 1952:

> "• • • I was retained by the Northern Westchester Bank, for the purpose of instituting an action to foreclose a mortgage upon the said property owned by the incompetent, and upon investigating the same, learned of the mental capacity of the said Nora Brainard, and by reason thereof withheld proceeding with said action, knowing from my investigation that she was a person of unsound mind and unable to understand the nature of her acts or the nature of process to be served upon her. This information, which I then gained, was available to all persons in the Town of Somers, from mere investigation or conversation with the neighbors of the incompetent." (R. 9-10)

October 22, 1953—On the aforesaid affidavits of appellant and his attorney, a judge of the County Court of the County of Westchester issued an order to show cause why an order should not be made opening the default of Nora Brainard, one of the persons referred to in the "Notice of Foreclosure of Tax Liens in the Town of Somers, *in Rem*"; why the judgment entered therein should not be vacated; why the deed delivered to the town should not be set aside and why Nora Brainard, an incompetent, by her committee should not be permitted to answer or appear or otherwise move with respect to the aforesaid notice of foreclosure (R. 3-12).

The order to show cause stayed the sale of the property for a minimum price bid of not less than $3500 scheduled for October 24, 1953. (R. 4, 11).

December 3, 1953—The County Court of the County of Westchester rendered an opinion denying the aforesaid motion to open the default, to vacate the judg-

ment of foreclosure, to set aside the deed, and to permit the defendant by her committee to appear in the *in rem* proceeding.

In that opinion the Court pointed out:

"* * * that the procedure adopted by the applicant is improper. Subdivision 7, section 165-h of the Tax Law provides substantially that there is a conclusive presumption after two years from the date of the recording of the deed that the action and all proceedings were regular and in accordance with the provisions of law relating thereto, and further provides 'No action to set aside such deeds may be maintained unless the action is [fol. 18] commenced and a notice of pendency of the action is filed in the office of the proper County Clerk prior to the time that the presumption becomes conclusive * * *'. In the case at bar no action to set aside the deed has been commenced and no *lis pendens* has been filed although the time that the presumption becomes conclusive has not expired. * * *" (R. 12-13).

The aforesaid presumption created by Subdivision 7 of section 165-h of the New York Tax Law would not become conclusive until October 24, 1954, nearly a year later, because, as noted above, that subdivision provides in part: "After two years from the date of the record of such deed, the presumption shall be conclusive * * *."

December 16, 1953—An order was made and entered in the office of the County Clerk of Westchester County denying the aforementioned motion (R. 2-3).

December 23, 1953—Appellant appealed to the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, from the final order of the County Court denying the aforesaid motion (R. 1-2).

April 12, 1954—An order was made by the Appellate Division affirming, with one justice dissenting, the aforesaid order of the County Court of the County of Westchester (R. 15-16).

At that time appellant still had six months within which to bring an action under Subdivision 7 of section 165-h of the New York Tax Law.

June 1, 1954—The Appellate Division granted a motion by appellant for leave to appeal to the Court of Appeals from its order and certified the question above quoted (R. 14-15).

October 24, 1954—The presumption of regularity created by Subdivision 7 of section 165-h of the New York Tax Law as to all of the *in rem* proceedings in connection with the property of Nora Brainard became conclusive.

November 24, 1954—Appellant filed a notice of appeal and return in the Court of Appeals pursuant to the aforesaid leave granted by the Appellate Division on June 1, 1954 (R. 19).

February 28, 1955—The Court of Appeals unanimously affirmed without opinion the order of the Appellate Division and answered the question certified in the affirmative (R. 19).

April 21, 1955—The Court of Appeals denied appellant's motion for reargument, granted appellant's motion for amendment of the remittitur to show that a question under the Constitution of the United States had been presented and necessarily passed upon, and stated that by its prior decision it held "that there was no denial of any constitutional right of the petitioner [the appellant]." (R. 21-22)

ARGUMENT

I

This appeal does not involve the constitutionality of Article VII-A, Title 3 of the New York Tax Law

A. Insofar as provision is therein made (1) for foreclosing tax liens by actions in rem, (2) for giving notice thereof by publication, by posting and by mail, (3) for opportunity to question the validity or the amount of the lien (4) for opportunity to question the regularity of the proceedings;

B. Insofar as no provision is therein made (1) for ascertaining whether the proceedings are against lands owned by infants or incompetents (2) for the appointment of a special guardian to protect the interests of possible infants and incompetents;

C. In respect to whether there has been compliance therewith;

D. In respect to the equal protection clause of the Fourteenth Amendment.

Appellant admits that "this case does not involve the invalidity of the taxing statute *per se*" (Br. p. 9).

Appellant does not claim that the provisions in Title 3 of Article VII-A of the New York Tax Law for foreclosing tax liens by actions *in rem*, for notice by publication, by posting and by mail, for opportunity to question the validity and amount of the lien do not satisfy the due

process requirements of Section 1 of the Fourteenth Amendment of the United States Constitution.

See,

Winona & St. Peter Land Co. v. Minnesota, 159 U. S. 526, 537;
Leigh v. *Green*, 193 U. S. 79;
Longyear v. *Toolan*, 209 U. S. 414, 418;
Ontario Land Co. v. *Yordy*, 212 U. S. 152, 156-158;
Horne et al. v. *City of Ocala*, 311 U. S. 608;
City of New Rochelle v. *Echo Bay Waterfront Corp.*, 268 App. Div. 182 (2d Dept.) aff'd, 294 N. Y. 678, cert. den. 326 U. S. 720.

The first case cited held constitutional statutory procedures for foreclosures of tax liens by actions *in rem* which were substantially the same as those contained in Article VII-A, Title 3 of the New York Tax Law, and the last case cited involved Title 3 of Article VII-A of the New York Tax Law. See, also, *Chapman* v. *Zobelein*, 237 U. S. 135, 138.

Appellant does not and could not claim that the statute does not afford an opportunity to challenge the regularity of the foreclosure proceedings or that he has not had a reasonable time within which to do so by the procedure provided therefor.

Subdivision 7 of section 165-h of the New York Tax Law makes the giving of a deed following a judgment of foreclosure of a tax lien only presumptive evidence of the regularity of the action (See, *Marx* v. *Hanthorn*, 148 U. S. 172). Under that subdivision the presumption of regularity only becomes conclusive after two years from the date of the record of such deed. The latter provision is not, as appellant says, (Br. p. 9) "the equivalent of forfeiture" but a statute of limitation within the constitutional power of the Legislature of the State of New York to enact, pro-

vided that a remedy exists and reasonable time is given to pursue that remedy. (See, *Saranac Land, &c., Co.* v. *Comptroller of N. Y.*, 177 U. S. 318; *Turner* v. *New York*, 168 U. S. 90; *Bardon* v. *Land & River Improvement Co.*, 157 U. S. 327, 333-334; *Terry* v. *Anderson*, 95 U. S. 628.)

Here the Courts of New York have determined that a remedy existed, to wit: an action to set aside the deed and that the procedure adopted by appellant was improper. This, appellant does not dispute. Under the practice of the State of New York a distinction is made between an action and a motion (See N. Y. Civ. Prac. Act §§ 4 and 13, and *Matter of Burge*, 203 Misc. 677, 681, rev'd on other grs., 282 App. Div. 219, aff'd, 306 N. Y. 811). Moreover, even if appellant's motion could be treated as the equivalent of an action to set aside the deed, there still would not be compliance with the statute since no notice of pendency of the action was filed (§ 165-h, 7).

Here the Courts of New York have inferentially determined that appellant had a reasonable time to pursue that remedy. This, appellant does not dispute. Furthermore, since appellant was advised by judicial decision of the existence of this remedy and the necessity of pursuing it nearly a year before the statute of limitation had run against it he would not be heard to say that the period of limitation was unreasonable.

Appellant admits (Br. pp. 8-9) that upon a default judgment must be entered directing the collecting officer of the tax district to prepare and execute a deed conveying title to the parcel or parcels concerned regardless of whether owned by an infant or an incompetent (See, *Johnson* v. *Smith*, 297 N. Y. 165, 171, and cases cited; 2 Cooley on Taxation, 4th Ed. § 585; 3 Cooley on Taxation, 4th Ed. § 2532), and appellant does not contend that the New York statute

is repugnant to the due process clause of the Fourteenth Amendment because no provision is made to ascertain whether proceedings under the statute are against lands owned by infants or incompetents or because no provision is made for the appointment of a Special Guardian to protect the interests of possible infants and incompetents. (See *City of Utica* v. *Proite*, 178 Misc. 925, aff'd. 288 N. Y. 477; *Ballard* v. *Hunter*, 204 U. S. 241, 254-255.)

To make the validity of tax titles dependent upon whether the owners of the lands proceeded against were adults of sound mind would "render havoc with titles to real property so acquired". Appellant disclaims seeking any such ruling (Br. p. 15).

Furthermore, the rights of appellant's incompetent have not been lost for lack of appointment of a guardian. Appellant was appointed her guardian long before the statute of limitation had run against the right to bring an action, and appellant had been judicially made aware of the existence of the remedy nearly a year before it expired. The incompetent's rights were lost because appellant chose to ignore judicial advice. Even if he had reasonable grounds for questioning the soundness of the Court's decision, he could have brought an action and still have challenged by appeal the Court's decision.

Appellant concedes (Br. pp. 6, 10, 14) that there was strict compliance with the provisions of Article VII-A, Title 3 of the New York Tax Law.

Although in the questions said to be presented (Br. pp. 2-3) appellant asserts that there has here been a denial of equal protection of the laws, nowhere in the brief is there any specification or argument in support thereof. In the conclusion to the brief relief is sought only on the ground of lack of due process.

The constitutionality of the provisions of Article VII-A, Title 3 of the New York Tax Law generally is not involved in this case. This appeal involves solely the question whether the Town of Somers has deprived appellant's incompetent of her property without due process of law in applying those provisions.

II

The Town of Somers did not deprive appellant's incompetent of her property without due process of law in complying with Article VII-A, Title 3 of the New York Tax Law.

As noted above, appellant does not question that the Town of Somers complied with the provisions of Article VII-A, Title 3 of the New York Tax Law. Appellant's only complaint is that the notice provided in Title 3 was insufficient because upon investigation the officials of the Town could have discovered "the mental capacity of said Nora Brainard". The statute provides for no such investigation and no such investigation is essential to due process of law. (See, *City of New Rochelle* v. *Echo Bay Waterfront Corp.*; *supra*, 268 App. Div. 182 (2d Dept.) aff'd, 294 N. Y. 678, cert. den. 326 U. S. 720; *City of Utica* v. *Proite*, *supra*, 178 Misc. 925, aff'd, 288 N. Y. 477; *Johnson* v. *Smith*, *supra*, 297 N. Y. 165, 171; 2 Cooley on Taxation, 4th Ed. § 585; 3 Cooley on Taxation, 4th Ed. § 2532.) Indeed, as shown above, appellant does not claim otherwise. But, he says, the officials of the Town were derelict in their duty to inform the Court of Nora Brainard's mental capacity. However, at the time the foreclosure judgment was entered, Nora Brainard had not been declared an incompetent, and there is no evidence in the record to support a finding that at that time she was an incompetent. But, assuming that the offi-

cials of the Town knew or should have known that she was an incompetent and that, therefore, the notice given would be insufficient, it was not the insufficiency of the notice of redemption that caused the incompetent to lose her property. The incompetent lost her property because appellant, her committee, did not pursue the due process the law provided. Had appellant brought the proper action within the ample time available to him after he was judicially advised to do so, and had he been able in that action to establish that the incompetent's failure to redeem had been brought about by a dereliction in duty on the part of the responsible officials of the Town, he could have obtained the relief he sought by this motion. To remedy his own neglect, appellant would now have this Court declare the statutes of New York unconstitutional.

Assuming, on the other hand, that appellant can be heard to say that the incompetent's property has been taken without due process of law because the conclusive presumption of Subdivision 7 of section 165-h of the New York Tax Law is no bar in favor of the Town where the running of the statute of limitation was brought about in part by dereliction of its officials (*Martin* v. *Barbour*, 140 U. S. 634, 646), the record on this appeal will not support a finding of such dereliction. The implications of fraud and dereliction are based solely on an "opinion" of the attorney for appellant that "Nora Brainard was and has been an incompetent for more than 15 years" before this foreclosure action was brought and on a statement by appellant that at some undisclosed time after the judgment of foreclosure was entered he "learned of the mental capacity of said Nora Brainard" (R. 5, 9-10). It is of legitimate concern to the State of New York that the conclusive presumption of Subdivision 7 of section 165-h of the New York Tax Law should not be nullified, and that the validity of tax titles should

not be subject to challenge on such speculative and inconclusive averments.

Conclusion

As the Court of Appeals of the State of New York held, there was no denial of any constitutional right of appellant as committee for the incompetent and the order of that Court should therefore be affirmed.

Dated: March 7, 1956.

Respectfully submitted,

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